REPORTS

Global Forum on Competition

2001

Introduction

This publication includes the documentation presented at the first Global Forum on Competition. The Forum was inaugurated at a meeting held in Paris in October 2001.

Overview

The program of the Forum included four main sessions on: the roles and tools of competition authorities in implementing reforms, hard core cartels; instruments of co-operation, and merger review with a focus on co-operation in trans-border transactions.

Related Topics

Prosecuting Cartels without Direct Evidence (2006)
Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations (2005)
OECD Council Recommendation on Merger Review (2005)
Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity (2004)
Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998)
Revised recommendation of the Council Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade (1995)

GLOBAL FORUM ON COMPETITION

-- 17 and 18 October 2001 --

OECD GLOBAL FORUM ON COMPETITION

-- 17 and 18 October 2001 –

The OECD Global Forum on Competition is one of eight "Global Forums" created to deepen and extend relations with a larger number of non-OECD economies in fields where the OECD has particular expertise and global dialogue is important. The Competition Committee has for decades been the leading forum for regular, focused, off-the-record policy dialogue among the world's leading competition officials. The Committee groups together Members' competition authorities and those of six observers (Argentina, Brazil, Israel, Lithuania, Russia and Chinese Taipei).

This dialogue has built mutual understanding and had substantial real-world benefits, such as means of conflict avoidance and co-operation that have been used successfully by Members and non-Members. The Competition Committee has also identified voluntary "best practices" and created substantial analytical convergence. [Relevant materials are available on the Web site: http://www.oecd.org/competition].

For more than a decade, the OECD's Members and Secretariat have been co-operating on competition law and policy matters with a wide variety of non-Members. Until now, this co-operation has consisted largely of regular capacity building activities and occasional conferences. With the advent of the Global Forum on Competition, OECD co-operation with non-Members has expanded to include in-depth "OECD-style" dialogue with an increased number of economies with which OECD Members have a strong interest in a common agenda. This Forum does not replicate the universality of other institutions; rather, it creates an expanded network of high-level officials from 55 or more economies who meet regularly (in principle twice a year) to share experiences on "front burner" competition issues.

Like other OECD activities, the Forum is inter-governmental, but some regional organisations and other international organisations such as the World Bank, UNCTAD, and the WTO also participate. Through the Business and Advisory Committee to the OECD (BIAC), the International Bar Association (IBA), the Trade Union Advisory Committee (TUAC) and Consumers International, representatives of the business community and consumers also have input and are invited to selected discussions. The Forum is organised by the OECD's Competition Division and its Centre for Co-operation with Non-Members (CCNM).

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The present publication includes the documentation presented at the first Global Forum on Competition. The Forum was inaugurated at a meeting held in Paris on 17 and 18 October 2001. Ministers and high level officials from the OECD Members, the European Commission, and 22 non-Member economies attended. The non-Members attending included the six observers to the Competition Committee (Argentina, Brazil, Israel, Lithuania, the Russian Federation and Chinese Taipei) as well as Bulgaria, Chile, China, Egypt, Estonia, India, Indonesia, Kenya, Latvia, Romania, Slovenia, South Africa, Thailand, Ukraine, Venezuela, and Zambia.

The Forum opened with keynote speeches by EU Competition Commissioner Mario Monti; the Secretary General of UNCTAD, Rubens Ricupero; and U.S Deputy Assistant Attorney General William Kolasky. The rest of the morning focused on the role of competition policy in economic reform, the roles and tools of competition authorities in implementing reform, and instruments of international co-operation. The BIAC, the IBA and Consumers International participated in these sessions. Subsequent sessions were restricted to representatives of governments and international organisations. They addressed specific law enforcement issues -- Hard Core Cartels and Merger Enforcement -- and the topics and organisation of future meetings.

OECD GLOBAL FORUM ON COMPETITION

- - 17-18 October 2001 - -

SESSION IV. HARD CORE CARTELS

Questionnaire on Anti-Cartel Actions
Summary of Cartel Cases Described by Invitees
Suisse - Les cartels rigides en droit suisse de la concurrence
Ukraine - Anticompetitive Concerted Actions
Think Antitrust - The Role of Antitrust Enforcement in Federal Procurement

SESSION V. MERGER REVIEW - FOCUS ON CO-OPERATION IN TRANSBORDER TRANSACTIONS

Merger Enforcement and International Co-Operation 
(*Note by the* OECD *Secretariat*)
Merger Enforcement and International Co-Operation - Documentation of the Roundtable of. Working Party No. 3 of the Competition Committee
Summary of mergers cases 
(*Note by the* OECD *Secretariat*)
Australia - Merger Review - Cooperation in Transborder Transactions
Mexico - Merger Enforcement

OTHER CONTRIBUTIONS

Bulgaria
Chile
China
Estonia
Indonesia
Kenya
Latvia
Peru
Romania
Slovenia
South Africa
Chinese Taipei
Thailand
Ukraine
Venezuela
Zambia

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

15-Oct-2001

English - Or. English

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP(2001)2/REV1
Unclassified

OECD Global Forum on Competition

REVISED PROVISIONAL FORUM AGENDA

To be held at the OECD, Château de la Muette, 2 rue André-Pascal, 75116 Paris, on 17 October and 18 October, starting at 9:00 am

JT00114599

English - Or. English

OECD GLOBAL FORUM ON COMPETITION
Paris, 17-18 October 2001

Provisional Forum Agenda

17 October

9:00-10:00 I. Welcome; Explanation of Purposes; Keynote Speeches

- Deputy Secretary General Seiichi Kondo, OECD
  Competition Law & Policy Committee Chair Frédéric Jenny
- Keynote speakers:
  - Commissioner Mario Monti, EU
  - Secretary General Rubens Ricupero, UNCTAD
  - US Deputy Assistant Attorney General William Kolasky

10:00-12:00 II. The Role of Competition Policy in Economic Reform;
The Roles and Tools of Competition Authorities in Implementing Reform

Chair: Frédéric Jenny (France)

Presentations on the role of competition policy in economic reform:

- Chairman Nam-kee Lee, Korea Fair Trade Commission
- Minister for Antimonopoly Policy Iliya Yuzhanov, Russian Federation
- Minister for Law, Justice and Company Affairs Arun Jaitley, India

Presentations on how competition authorities promote compliance with competition law and attention to competition policy principles, followed by general discussion.

- Canada will present the "conformity continuum" that describes the range of education, compliance and enforcement tools it uses.
- The Indonesian authority will discuss the difficulties of promoting compliance with a new law when there is no competition culture.
- The Chinese Taipei FTC will describe how it has worked to develop a competition culture by educating the public, business, and government.
- BIAC and Consumers International will also make presentations.

The OECD Secretariat is pleased to acknowledge the financial support of the Australian Agency for International Development, the Japan Fair Trade Commission, and the Korea Fair Trade Commission.

12:00-1:00 III. Instruments of Co-operation

Chair: Claudio Monteiro Considera (Brazil)

The OECD Secretariat will present the basic concepts contained in the 1995 and 1998 Recommendations: "negative" comity, investigation assistance, and positive comity. There will be an opportunity for members to discuss the nature of their enforcement co-operation, as well as progress in overcoming bans on information sharing, and for invitees to discuss their experiences and perspectives on enforcement co-operation.

1:00-3:00 Buffet Lunch Organised by OECD (for all participants)

3:00-6:00 IV. Hard Core Cartels

A. The OECD Anti-Cartel Programme

Chair: Margaret Bloom (United Kingdom)

The Secretariat will describe the anti-cartel program and present its draft *Report on the Nature and Impact of Hard Core Cartels' and the Sanctions under National Competition Laws.* Participants have an opportunity to offer comments on the draft itself and on what it suggests in terms of further study. In addition, the Secretariat will present a brief summary of the main points emerging from the cartel cases submitted by Invitees, and there will be will be further presentations and/or interventions by participating economies.

B. Collusive Tenders in Government Procurement.

Chair: Bambang Adiwiyoto (Indonesia)

This session addresses a widespread problem that is generally banned even in economies without competition laws. Slovenia is the only confirmed presenter, but others are expected. After the initial presentations, the session will follow a "roundtable" format.

18 October

9:30-11:30 V. Merger Enforcement; Co-operation in Transborder Transactions

Chair: Konrad von Finckenstein (Canada)

This session will begin with a discussion of general merger enforcement issues and then focus on co-operation in transborder transactions. Each of the presentations listed below will be followed by any additional presentations and general discussion.

- Mexico will discuss how it developed its merger enforcement programme.
- Australia will discuss international co-operation issues, including the situation in which a merger of foreign firms -- with or without domestic assets -- may create domestic harm to competition.

11:30-1:00 VI. Evaluation; Future Work; Closing

Chair: Frédéric Jenny (France)

- Participants will be asked to present their views on future topics, procedures, and formats for the Forum, including the extent to which future meetings should be limited to government officials and the possible benefits of holding some meetings jointly or back-to-back with other organisations or events. The agenda for the second Forum meeting, to be held in February 2002, will also be discussed.
- Chairman Jenny and South African Competition Commissioner Menzi Simelane will offer some final comments, followed by brief remarks from Eric Burgeat, Director, Centre for Co-operation with Non-Members.

Session I.

Opening of the Global Forum on Competition

Check Against Delivery

GLOBAL FORUM ON COMPETITION
Paris, 17 October 2001

Draft opening remarks of
Mr. Seiichi Kondo
Deputy Secretary General
Organisation for Economic Co-operation and Development

Introduction

1. Good morning, ladies and gentlemen. Welcome to the first Global Forum on Competition, bringing together competition law and policy leaders of OECD Members, of observers to the OECD Competition Law and Policy Committee and of about 20 invited economies, together with representatives of UNCTAD, the World Bank, the WTO, and several regional organisations. I am pleased that the Business and Industry Advisory Committee, Consumers International, and the International Bar Association are here for the Forum's initial sessions. And I appreciate the financial support of the Australian Agency for International Development, the Japan Fair Trade Commission, and the Korea Fair Trade Commission.

2. Five years ago, speaking to the first Ministerial conference of the World Trade Organisation in Singapore, OECD Secretary General Donald Johnston said that “This is the dawn of the age of globalisation, and when historians tell of it, let us make sure that it is a good story.” Since then, and not least in the last weeks, it has become ever more clear that we live in a global society, and that globalisation carries with it both risks and opportunities.

3. One major issue facing the world economy is the disparity in economic performance between different regions. Poverty reduction is today a priority for industrialised and poor countries alike. And a competitive market economy is now widely recognised as the only viable means to create sustainable economic efficiency and growth.

4. However, a competitive economy does not mean an unregulated economy. An unregulated economy would not provide the desired economic or social benefits. The rule of law, dependable institutions, good governance, and efficient infrastructure contribute to an environment where growth and investments lead to increased welfare. Competition law effectively enforced by independent authorities, and regulatory reform guided by competition principles, are particularly important for making markets work to the benefit of all citizens, including the disadvantaged.

5. For decades, the OECD's CLP Committee has been the forum for its Members' discussions of ways to halt anti-competitive firm behaviour and government regulations in order to ensure that markets operate efficiently to benefit society as a whole. This has enabled OECD Members to develop their legislation and analytical approach in a process of voluntary convergence, resulting in increased co-operation between competition authorities in their day-to-day work.

6. In the last ten years, OECD work with non-Members has become substantially more important. The OECD has grown during this period from 24 to 30 members, and another five countries have become regularly participating observers to the CLP.

7. Indeed, for all of us -- both within and beyond the OECD -- competition law and policy is an essential aspect of providing economic security for vulnerable citizens. It is not widely recognised how much harm is caused by hard core cartels. For example, in the US alone, international hard core cartels that have recently been exposed have cost individuals and business many hundreds of millions of dollars *annually*. Global overcharges are not known but obviously much higher. In addition to overcharges, these cartels have caused waste and inefficiency that have been even more harmful to countries' economies and global welfare. Such conspiracies may occur in most product areas -- recent, well-known examples include food additives, vitamins, steel tubing, and cement.

8. Without an effective competition policy framework, companies can too easily collude to create artificial shortages that boost prices to monopoly levels, rig bids, or divide markets by allocating customers, suppliers, territories or lines of commerce. The

1998 OECD Recommendation Concerning Effective Action Against Hard Core Cartels aims to promote co-operation among countries in the crack-down against such abuses.

9. The Recommendation emphasises that such cartels create waste and distort world trade, but I would add another point for countries whose economies are still developing. The point -- simple, but often missed -- is that by restricting output, hard core cartels reduce an economy's productivity and hinder its development.

10. More than 80 countries now have competition laws. Those with modern laws and strong enforcement agencies are in a position to protect their consumers and their producers from the harm caused by hard core cartels and other anti-competitive activity. Especially for developing countries, such laws are a matter of economic self-defence.

11. Since the 1970's, many countries have used competition policy principles to reform government regulatory systems. However, there is sometimes fear that "competition policy" means letting laissez faire capitalism determine who gets what in our society. This fear is misplaced. In contrast to "laissez faire" approaches to regulation, competition policy does not mean deregulation but "reregulation" in a market-oriented way. In sum, it permits the realisation of regulatory goals at lower cost, which among other things permits societies to devote more resources to a social safety net.

12. This Global Forum on Competition is part of a larger program in which the OECD Centre for Co-operation with Non-Members has fundamentally reshaped its activities with non-Members to make them more focused, coherent and policy oriented. The OECD Global Forums are a set of specialised dialogue initiatives and networks in eight priority areas of global relevance.

13. This first meeting of the OECD Global Forum on Competition will be an expanded version of the kind of meetings and working methods that have led to so much convergence and co-operation among OECD Members. And what better launching could the Forum have than keynote speeches by EU Commissioner Mario Monti, US Assistant Attorney General William Kolasky, and UNCTAD Secretary General Rubens Ricupero.

14. I know that this is not the only initiative aimed at bringing together competition authorities and others to address competition law and policy issues. Two of our keynote speakers today -- Mr. Kolasky and Mr. Monti -- have in fact proposed an initiative with broadly similar goals. I welcome that. Co-operation with other partner organisations is a core principle of all OECD Global Forums, and we certainly welcome the opportunity to co-operate with a programme organised by the United States, the European Union, and others. The relationship between the OECD Forum and other programmes will be flexible, and should evolve on a complementary basis.

15. In closing, let me emphasise that the OECD has expanded the competition dialogue to include representatives of more non-Members because we are convinced of the mutual benefits of a broader approach. The global economy affects us all, highly industrialised countries as well as countries taking their first steps in establishing a competitive market economy. OECD Members need and welcome input from non-Members, and look forward to sharing OECD experience gained from both successes and failures. To that end, our discussions should be open and candid, helping us all to learn from each other.

16. I wish you all a fruitful meeting and hope that each of you will take home new ideas, increased mutual understanding, and expanded commitment that will benefit the global economy, your economies, and all of your citizens.

CHECK AGAINST DELIVERY

1st OECD Global Forum on Competition

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Opening Speech by Commissioner Monti

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OECD, Paris, 17 October 2001

Ladies and Gentlemen:

It is a great honour for me to participate in the opening of this 1st OECD Forum on Competition and to welcome here so many distinguished colleagues from competition authorities all over the world.

I would like first to praise this initiative of the OECD. It means reaching outside its circle of membership. It means establishing bridges with 3rd countries and agencies that are interested in competition law and enforcement and are keen to share with us their experiences and their views.

I would also like to stress that your presence in this groundbreaking event bears testimony to the growing international awareness surrounding competition policy. Today both governments as well as economic operators and the general public senses that competition policy has a key role to play in creating conditions of governance for the global market places. It is the best instrument available in order to ensure that globalisation remains a source of welfare for the citizens and the firms in our respective nations.

[Why competition policy is an important policy instrument ?]

Competition policy is indeed an important policy instrument both at the domestic and at the international level. But why is that so?

Whilst the philosophical arguments are many and varied, I think the answer is straightforward. Competition policy is there to help nations achieve economic prosperity and increase the welfare of society.

How does competition policy achieve this goal? By forcing companies to run themselves efficiently and ensuring a level playing field. Competition forces economic operators to adjust to changes and it forces them to innovate. Competition leads to lower prices and to higher quality for the consumer. It leads to greater dynamism in industry, and, perhaps, most importantly of all, to greater job creation.

I will say a few words on our experience in the European Union. I will then listen with the keenest of interests to your experiences. I know quite well that competition policy and antitrust enforcement can take a variety of forms and expressions.

I hope and I wish that out of this variety and wealth, we will be able in our future dialogue to reach consensus in selecting the best ways, the best methods and practices, those that work best in the various situations. And then I hope that we will agree to progressively put them into effect in our respective jurisdictions.

[What is the role of competition policy in the European Union?]

Let me now turn to our own experience with competition policy in the European Union. I can confidently say that, today, competition is considered a central element of our economic system. We have now abandoned the old fashioned policies of industrial intervention by governments and a belief in national champions.

Turning away from these outdated ideas has not meant that the ‘market’ goes unchallenged. On the contrary, we believe that competition policy is an essential element of an open market economy. Markets need to be protected against the creation of dominant positions, cartels and abuses of market power. That is why we believe in the importance of a strong competition authority. That is why we must apply the competition rules in a rigorous and transparent way. I can not stress enough the importance of a solid institutional system for antitrust enforcement. Such a system is based on an independent antitrust agency that enforces the rules under the control of the judiciary.

I should add here that, in the European Union, competition policy has another political and economic objective in addition to the traditional anti-trust purposes I've just outlined. It strives namely to achieve and maintain the integration of markets within the EU. An active competition policy is needed in order to discourage business practices which have the effect of restraining trade between Member States of the Community. In our experience this function of competition policy is crucial for regional integration systems. One level up, it could provide some solutions at the global level.

Another area where competition policy has been valuable for the European economy is the control of state subsidies given to firms. This is an integral part of our pursuit of a coherent competition policy (and indeed I believe

that state aid control should be a feature of any competition policy). It is obvious that competition between firms is distorted when public authorities confer an advantage (state aid) on an individual company or category of companies; firms not benefiting from the aid are placed at a competitive disadvantage vis à vis the aid beneficiary. It is true that certain forms of aid can produce general economic benefits. Such benefits may outweigh the damage to the economy caused by the distortion of competition between firms. It is should be the task of competition authorities to carry out this balancing exercise.

But competition is not an end in itself; something useful only for our domestic economy. It is also a tool to help us react and cope with the changes we face at the international level: globalisation and technological innovation, trade liberalisation. These changes are a challenge, but they are also an opportunity. An opportunity to adapt our domestic rules to the new global environment.

[From a domestic competition policy to an international one]

You are all aware of the parameters of this new environment: a major expansion of market economy, markets integrated due to cross-border operations, deregulation and privatisation, global players adapting and devising new cross-border strategies to profit from all this, and finally an important increase in 'international' competition cases.

As policy makers and enforcers in the area of antitrust we have to face three challenges under this new environment.

- Firstly, we have to find ways to overcome the jurisdictional barriers inherent in the territorial nature of antitrust enforcement jurisdiction. When we are asked to apply our antitrust rules today, we increasingly observe that consumers whom we are mandated to protect are being adversely affected by anticompetitive behaviour taking place outside our jurisdiction. Often, we have to overcome a number of legal and practical obstacles to discover the necessary evidence and to impose sanctions on global cartels which are detrimental to the efficient conduct of business and harm consumers. The same applies to abuses or attempts at monopolisation by dominant players on the world market. Further, we need to take into account the issues arising in connection with multijurisdictional mergers. As a growing number of jurisdictions adopt merger control regimes, with differing notification requirements and substantive standards, we face an increased risk that we reach conflicting

decisions and impose on firms remedies which may be incompatible with each other.

- Secondly, we must address the broader challenge raised by globalisation in terms of world governance. Recognising that consumers and companies alike are increasingly citizens of a globalised economy, we have the difficult mission of ensuring that international integration of markets leads to maintained competitive outcomes, thus making the globalisation process both economically more efficient and socially more acceptable. Competition policy – and specifically international co-operation on competition policy - has an important role to play, if we are to avoid resentment against globalisation and a protectionist backlash.

- Thirdly, developing countries and countries in transition are restructuring their economies in an effort to integrate them fully to the world economy and be able to exploit new opportunities to compete. In order to claim their share in the benefits of globalisation, more developing countries adopt economic reform packages, which liberalise entire sectors, privatise state owned enterprises and introduce competition laws and policies. They naturally look to established competition authorities for support and technical assistance.

I believe all of us are increasingly aware of these challenges and are convinced that we need to provide a pragmatic and effective response of international governance to the integration of markets.

[How can we work towards better governance at the global level?]

The term ‘governance’ appeared in recent years in various contexts. A United Nations report focusing on ‘Global Governance’ stresses the need for building an international consensus around certain rules and then applying them effectively all over the world even in the absence of a ‘global government’. As regards competition, it is important that we do not allow the interdependence and interaction of economic operators to grow without submitting it to some instance of regulation and surveillance. Since our competition systems are essentially domestic, we must seek to ensure a maximum of convergence and coordination between them. This task is made more difficult by the day, in view of the ever growing number of competition enforcement systems and the variety of economic and political considerations that underpin them.

There are, in my view, two ways to incorporate governance mechanisms into the system of international competition policy. They are

complementary and mutually supportive. All of them are designed to intensify cooperation between antitrust authorities worldwide and build a convergence spin into the system:

⇨ Reinforcing bilateral cooperation

First, we should continue to develop our bilateral cooperation instruments. Cooperation in competition matters is provided for in international agreements which the European Union has concluded with many of our trading partners; in the case of the US and Canada we have concluded dedicated cooperation agreements. In other cases cooperation of this kind is provided for in broader trade-related agreements (for instance our Customs Union accord with Turkey) or in rules drawn up for their implementation (for example, the Europe Agreements with the countries of Central and Eastern Europe. The desirability of such cooperation is also reflected in the OECD Recommendations on cooperation in antitrust matters and on the fight against hard core cartels. With more than a decade of experience we have come to recognise that there are important benefits to be gained from effective bilateral cooperation. Indeed, in many instances, it is on balance more beneficial to cooperate than exercise unilateral extra-territorial jurisdiction. Often coordination of enforcement in more than one jurisdiction is the most appropriate course of action. Much has been achieved though bilateral cooperation and it is fair to say that we have now at our disposal a formidable range of cooperative tools.

⇨ Creating a global network of competition authorities

Second, we should work towards the creation of a global network of competition authorities. This should be an inclusive venue where those responsible for the development and management of competition policy worldwide could meet, engage in constructive dialogue and exchange their experiences on enforcement policy and practice. It should be open to all countries which have a competition law enforcement regime, i.e. a basic legislative framework of competition rules, an administrative and/or judicial enforcement capacity, and an enforcement record. Developing countries which are in the process of putting in place a competition regime and building the requisite institutional capacity should be encouraged to join this effort. It should also be possible to associate in the work of this network, in an advisory role, non-government bodies. This would enable the legal profession, the business community, consumer representatives, antitrust academics and other experts to contribute. Network members should strive to achieve a maximum of convergence and consensus on fundamental issues such as the substance and economics of competition policy, and the enforcement priorities of competition authorities. Such consensus should result from a common understanding about the best

approach to solving the problems. This project would foster and develop a common worldwide "competition culture" and encourage developed and developing countries world-wide to introduce and enforce sound competition policies.

Let me conclude by repeating that, in my view, in the globalised world, effective competition authorities are increasingly seen as the trustee, if not of good governance then certainly of the possibility of good governance ! In the coming work sessions we will have the opportunity to compare notes on our respective practices in areas such as merger control, the fight against cartels and international cooperation. I am certain that this will be highly beneficial for all of us.

Ladies and Gentlemen, thank you very much for your attention !

Prof. Mario Monti,

Member of the European Commission with responsibility for competition policy

Check Against Delivery

Statement by Rubens Ricupero,
Secretary-General of UNCTAD,
to the OECD Global Competition Forum
Paris, 17 October 2001

Mr. Chairman, ladies and gentlemen:

It is a great pleasure for me to be here with you today. I am especially grateful to the OECD organizers, and particularly to Mr. Kondo, Deputy Secretary-General, Mr. Frederic Jenny, Chairman as well as to Mr. Joe Phillips and his team for inviting me to participate in the launching of the OECD Global Competition Forum.

My presence here is but one indication of the strong bond of cooperation between UNCTAD and OECD, both generally and in the specific area of competition law and policy. This most welcome trend should continue.

The concept of a Global Competition Forum, initially proposed by the ICPAC Report, has aroused great interest among all practitioners and authorities responsible for implementing competition law and policy. Its establishment represents a commitment to the strengthening of international cooperation in the area of competition law and policy. The importance of such cooperation is heightened by the processes of globalization and liberalization. These processes may have positive effects in promoting competition, but they may also be associated with, or induce, anti-competitive behaviour that can affect all countries, including developing countries.

When I refer to developing countries, I am of course including the least developed countries (LDCs). At the Third United Nations Conference on the Least Developed Countries, organized by UNCTAD and hosted by the European Union in Brussels last May, it indeed became very clear that LDCs suffer from anti-competitive practices, like other countries – and perhaps more than other countries, given their weak institutional infrastructure and the small size of their markets. I therefore welcome the presence in the Forum of several non-OECD member countries, and particularly developing countries, including LDCs.

In this connection, I would like to make a few observations in the light of the tragic events of last month and of the changes brought about by an ever-worsening global slowdown: with the shrinking of markets, competition becomes harsher between firms and there is a growing temptation for them to engage in anti-competitive practices, in particular to collude in order to share remaining markets among the main players. Moreover, in view of the dramatic conditions currently prevailing in such sectors as the airlines, Governments may be tempted to provide immediate support to affected enterprises, and there is a risk of present conditions being used to salvage structurally weak enterprises or to authorize the establishment of special "crisis cartels". Any resulting distortions to competition may have adverse repercussions for enterprises in weaker trading partners, developing countries in particular, which are often unable to shield their own enterprises from recession or to bail out failing firms – at least not to the same extent as the stronger trading partners. Thus, such action in developed countries might shift the effects of the crisis to other

countries and trigger deeper crises in the developing world. I would urge all Governments, especially those of the OECD countries, to take into account that any such competition-distorting measure might hit emerging economies and reduce the positive effects of trade liberalization and competition policies for world markets.

While developing countries that have competition legislation may have difficulties in implementing their laws effectively, it is clear that, more than ever, there is a need for a rules-based system at the global level which would avoid placing most of the burden of adjustment on the weakest trading partners.

The work of the Forum should be seen in the context of other multilateral cooperation efforts in the area of competition law and policy within the WTO and within UNCTAD itself. UNCTAD oversees the implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, or RBPs, which was adopted by the UN General Assembly in 1980 and which remains the sole multilateral instrument of a universal character dealing with this area. Although not legally binding, the Set has the political authority and legitimacy of a unanimously adopted Assembly resolution. Its continuing validity and relevance were reaffirmed by the Fourth UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules, which took place in Geneva in September 2000.

Two of the Set's key objectives are to ensure that RBPs do not impede or negate the benefits of trade liberalization, particularly RBPs affecting the trade and development of developing countries; and to encourage greater efficiency in trade and development, in accordance with national aims of economic and social development and existing economic structures. While universally applicable to all transactions in goods and services and all countries and enterprises, the Set provides that States, particularly developed ones, should take into account in their control of RBPs the development, financial and trade needs of developing countries, especially for promoting domestic industries or other economic sectors.

In line with the Set, UNCTAD has been deeply involved in enhancing developing countries' awareness of the adverse effects of RBPs on their markets, in cooperating with them to take the necessary steps to adopt, reform or better implement competition laws and policies, and in promoting better international understanding and convergence in this area. Allow me to elaborate on three areas of that involvement.

First, we undertake technical assistance, advisory and training programmes for developing countries and countries in transition. These programmes benefit from the cooperation and participation of experts from several developed and developing countries and from such international organizations as the OECD, the World Bank and the WTO.

Secondly, we publish relevant documentation as requested by Governments. Among this documentation, I would particularly like to highlight UNCTAD's Model Law, which is one of our recurrent publications. A key feature of this Law is that it is informative and not prescriptive -- it provides a checklist of the main elements

contained in a typical competition law, with a commentary of the approaches followed under different competition laws.

Thirdly, we organize annual meetings of an Intergovernmental Group of Experts on Competition Law and Policy, which holds consultations on different competition issues. This July in Geneva, at the latest meeting of the Group, I had the pleasure of receiving EU Commissioner Mario Monti; in his address to the Meeting, he urged that competition authorities enhance their dialogue and cooperation through open and inclusive multilateral frameworks, and extended a special offer of technical cooperation in this area to developing countries, including LDCs. We at UNCTAD intend to follow up on this excellent initiative and to continue to strengthen our cooperation with the EU in this area.

I will conclude by affirming that in all our activities in the area of competition law and policy, and in line with our mandates, UNCTAD stands ready to support the efforts of the Global Forum to strengthen international cooperation on competition law and policy. In particular, we may be able to help enhance the inclusiveness and responsiveness of this process to the concerns of developing countries and to enhance their constructive participation, thus reinforcing the global relevance, validity and legitimacy of the results obtained.

I wish you all success in your endeavours. Thank you.

DEPARTMENT OF JUSTICE

INTERNATIONAL ANTITRUST IN THE 21ST CENTURY: COOPERATION AND CONVERGENCE

Address by

CHARLES A. JAMES
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
OECD Global Forum on Competition
Paris, France
October 17, 2001

Good morning, ladies and gentlemen. It is delightful, as always, to be in Paris, and an honor to share a podium with our hosts, Deputy Secretary General Kondo and Vice-Chairman Jenny, and my co-speakers, Commissioner Monti and Secretary General Ricupero, at this inaugural meeting of the Global Forum on Competition sponsored by the Organization for Economic Cooperation and Development (OECD).

I am also very pleased and a bit awed to be speaking before colleagues from 55 countries from every part of the world. For roughly 30 years, the OECD, through its Competition Law and Policy Committee, has played a crucial role in building consensus among OECD members on a wide range of antitrust and competition policy subjects. This Global Forum promises to make important new contributions to mutual education and understanding among an even wider range of antitrust authorities in developed and developing countries alike.

Introduction

In my remarks this morning, I will briefly review the history of the past decade in international antitrust enforcement. As you know, over this period there has been explosive growth in the number of countries with antitrust laws and agencies. This growth has amplified the importance of cooperation among antitrust agencies in ensuring sound antitrust enforcement in an increasingly global marketplace, and we have made good progress toward such cooperation. I will then examine, now that we have some practical experience in working together, some additional steps we might take to enhance our cooperative efforts in order to combat anticompetitive behavior more effectively and more efficiently.

Our experience with the proposed *General Electric/Honeywell* merger demonstrates, however, that close cooperation and goodwill between antitrust agencies does not guarantee consistent results in individual cases. A good working relationship cannot overcome significant differences in views about the proper scope of antitrust law in national and world markets.

In the early 21st century, therefore, antitrust agencies should begin to discuss two types of issues, in a detailed and sustained way, in both bilateral and multilateral contexts. First, we need to address certain practical law enforcement issues, especially in the areas of anti-cartel enforcement and merger review. Second, we must begin to address important substantive issues, as the OECD's Competition Law and Policy Committee will do later this week at its roundtable on portfolio effects. We believe that greater substantive and procedural convergence can be promoted by forming a Global Competition Network -- which we in the United States have previously called the Global Competition *Initiative* -- not to duplicate but to supplement the work of OECD and its Global Forum on Competition. I will close my remarks by setting forth our vision for the new Network.

The Rise of International Antitrust Co-operation

There was a time, not so many years ago, when few countries had antitrust laws and fewer still enforced them. (Indeed -- and this strains the imagination -- there was a time when there were very few international antitrust conferences.) But during the past decade, market principles, deregulation, and respect for competitive forces have been broadly embraced, and many countries have created antitrust laws and agencies that are committed to enforcing them. Over 90 countries currently have antitrust laws of some sort, and roughly 20 more countries are in the process of drafting such laws; all of the nations represented here today are in one or the other of these categories. During the past decade, the Department of Justice and our counterparts abroad have investigated and prosecuted many international cartels, and an

increasing number of antitrust agencies review many of the multinational mergers that characterize our global economy. All of these developments support the popular wisdom that increased cooperation between and among antitrust agencies is essential. But as important as cooperation is, it is sometimes quite difficult to achieve.

People have been thinking and talking about international antitrust cooperation for a long time. The Revised OECD Recommendation on antitrust cooperation,[1] which was most recently amended in 1995, is merely the latest in a series of similar OECD Recommendations reaching back to 1967. It has only been in the last decade, however, that the United States federal antitrust agencies -- the Department of Justice and the Federal Trade Commission -- have begun to gain significant practical experience in working with our antitrust colleagues around the world. We have learned that the range and complexity of international antitrust issues requires that we use a variety of cooperation tools.

The simplest and most common of these tools is informal communication between antitrust agencies. While there are important statutory and prudential limits that constrain our ability to share confidential information with colleagues in foreign antitrust agencies, there is a wealth of useful non-confidential information that can be and is shared.

Technical assistance is another important tool for international cooperation, and the United States has been an enthusiastic provider of such assistance. We sometimes joke that antitrust has been one of the United States' most successful exports. During the past decade, we and the FTC have sent nearly 250 missions to dozens of countries on six continents -- including nearly all of the non-OECD countries represented here today -- on both short-term trips and long-term advisory missions of six months or more. We have hosted hundreds of foreign antitrust officials on visits and internships to the Division and the FTC in order to share what we do and why we do it. And we have participated in many of the valuable conferences organized by the OECD, the WTO, and UNCTAD for antitrust officials from developing and transition countries, including, most recently, last month's workshop in Beijing of the APEC-OECD Cooperative Initiative on Regulatory Reform.

A third important tool is the bilateral antitrust cooperation agreement. We have entered into such agreements with Australia, Brazil, Canada, the European Commission, Germany, Israel, Japan, and Mexico. These agreements have been very useful, both for us and for our partners, and more such agreements are on the way. In international cartel matters, the Antitrust Division also relies on the United States' mutual legal assistance treaties (MLATs), which we now have with nearly 40 countries.[2]

Finally, I would be remiss to stand in this room and fail to mention the wonderful work that the OECD has done in promoting antitrust cooperation. Over the years, OECD members have learned from one another in roundtables on subjects ranging from competition in road transport, to corporate leniency

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[1] Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Document No. C(95)130/Final (Sept. 21, 1995).

[2] Of course, the U.S. is not alone in our use of bilateral cooperation agreements. To mention two obvious examples, Canada has several antitrust cooperation agreements and an increasing network of MLATs; and the EU and its member states are working both within and outside the Community to improve their cooperative arrangements.

programs in cartel cases, to this week's discussion of portfolio effects. And OECD discussions have led to important successes in convergence, such as the 1998 Council Recommendation on Effective Action Against Hard Core Cartels.

To summarize, ten years ago we thought that antitrust cooperation should work in theory. Now we know it works in fact, and will continue to form a vital part of an antitrust agency's toolkit.

When Cooperation Is Not Enough: the Lessons of *GE/Honeywell*

A decade of sustained cooperation has yielded a fair amount of substantive convergence among antitrust agencies around the world with respect to both cartels and mergers. Despite different verbal formulations in our various antitrust laws, agencies have tended to reach similar conclusions on matters when we become fully engaged with one another on the analysis and are working from a common set of facts. Indeed, there have been days when we thought (or hoped) that such cooperation itself would eventually minimize or resolve even the most serious areas of antitrust divergence. More recently, however, we have come to understand that cooperation alone will not resolve some significant areas of difference among antitrust regimes that must be addressed if we are to maintain the integrity of antitrust on a global stage.

After reviewing the recent proposed $42 billion merger of General Electric and Honeywell, the Justice Department cleared the merger, while requiring divestiture to address competitive concerns in two markets. But the European Commission, analyzing identical product and geographic markets and having access to the same facts we did, blocked the transaction in its entirety.

The U.S. and EU agencies reached inconsistent decisions despite a tremendous amount of coordination over several months, made possible by the parties' waiver of their confidentiality rights. In fact, I do not believe that we could have worked together more closely. Our staffs talked on the phone frequently and had extensive meetings in Washington and Brussels; the EC staff had access to our economic expert; and we had extensive substantive discussions at the very highest policy levels about the evidence and the theories the two agencies were pursuing. The glaringly inconsistent decisions, then, were not the product of a failure of cooperation or a lack of effort by either agency to ascertain the other agency's point of view.

The differences between the Justice Department and the EC flowed from an apparent substantive difference, perhaps a fundamental one, between the two agencies on the proper scope of antitrust law enforcement. We concluded that the merged firm would have offered improved products at more attractive prices than either firm could have offered on its own, and that the merged firm's competitors would then have had a great incentive to improve their own product offerings. This, to us, is the very essence of competition, and no principle is more central to U.S. law than that antitrust protects competition, not competitors.[3]

In stark contrast, the EC focused on how the merger would affect European and U.S. competitors, essentially concluding that the very efficiencies and lower prices the transaction would produce would be anticompetitive because they might ultimately drive some of those competitors from the market or reduce their market shares to a point where they could not longer compete effectively. In other words, the EC

[3] *See, e.g.*, *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958).

determined that the fact that customers would be "induced" to purchase more attractive and lower-priced GE/Honeywell products, rather than those of its competitors, was a bad thing of a sort that its antitrust law ought to prohibit.

This difference in approach to analyzing mergers under U.S. and EU antitrust law is significant. Under U.S. law, we believe that the purpose of the antitrust laws "is not to protect business from the working of the market; it is to protect the public from failure of the market."[4]

Indeed, the competitive process is largely about encouraging the more efficient to grow at the expense of the less efficient. This process inures greatly to the benefit of consumers. Firms are rewarded for cutting costs, lowering prices, and in the process displacing their rivals. Such competition sometimes means that inefficient rivals are driven out of business, but even if they are, consumers are better off overall. Our experience, however, is that business rivals rarely go quietly into the night. Instead, they typically respond by lowering their own costs and prices, competing harder to survive.

In our view, the so-called "portfolio effects" or "range effects" analysis as it has recently been employed is neither soundly grounded in economic theory nor supported by empirical evidence, but rather, is antithetical to the goals of sound antitrust enforcement. We fear that it will result in some procompetitive mergers being blocked, and others never being attempted, to the detriment of consumers in many countries. It will dissuade merging parties from talking candidly to antitrust agencies about the efficiencies they expect to realize, out of fear that such efficiencies -- even when they would clearly benefit consumers -- would be viewed negatively.

What are we going to do to address this difference of view about what goals antitrust laws should serve? Several things. First, of course, antitrust agencies should continue to recognize the many areas in which we do agree, and cooperate even more in those areas. Second, the U.S. agencies and the EC have agreed to take up this issue in our bilateral mergers working group, where we will educate one another about our respective views and, working at both staff and senior policy levels, try to reach some common ground. Finally, we believe that the "portfolio effects" theory is an excellent candidate for broader public discussion, including in appropriate multilateral fora; indeed, it will be discussed at OECD on Friday, at a roundtable offered by the Competition Law and Policy Committee. At some point, it might also be taken up in the Global Competition Network, a subject to which I now turn.

Towards a Global Competition Network

Strong cooperative relationships between and among antitrust agencies necessarily will continue to be an integral part of vigorous law enforcement efforts. But they are not a panacea for every issue that arises out of the globalization of antitrust. As I have already indicated, antitrust enforcement is no longer the concern of a handful of highly developed countries, nor even of the thirty OECD member countries. In order to achieve truly global convergence on important enforcement issues, multilateral efforts must supplement bilateral ties.

Perhaps because I have spent much of my professional life either investigating or defending mergers and acquisitions, I believe that the need for a new multilateral exercise to deal with unaddressed issues is most apparent in the merger area. Well over 60 jurisdictions around the world already have premerger notification regimes, and this number is likely to increase. Very few of these agencies review

[4] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

only local matters, even though their focus necessarily is on a merger's impact in their national economies. Rather, because both markets and firms are becoming increasingly global, antitrust agencies increasingly are finding that they are reviewing mergers that are also being reviewed by five, ten, or twenty other agencies around the world.

When transactions are reviewed by multiple authorities, the risk of substantive and procedural conflicts can increase dramatically, and effective cooperation among a large number of agencies can be extraordinarily difficult. On the substantive side, the potential for inconsistent outcomes increases substantially. On the procedural side, the burdens, costs, and uncertainties associated with filing in and dealing with a large number of reviewing jurisdictions pose serious concerns for the international business community. Among other things, they may discourage, unduly delay, or at best, constitute a tax on efficient, consumer-friendly transactions. These are difficult issues that may not have easy solutions, and certainly cannot be resolved unilaterally or through bilateral efforts alone.

Many antitrust officials and members of the antitrust bar have come to believe that these enforcement issues can best be resolved, not in any existing organization, but in a new one that is focused exclusively on the procedural and substantive issues directly affecting multijurisdictional antitrust enforcement, a task for which no existing organization has both vocation and mandate. We support the proposed Global Competition Network (GCN) because we believe that it can serve as exactly this type of problem-solving vehicle. I have spent a great deal of time during my first few months at the Antitrust Division thinking about the GCN and consulting with Tim Muris, Mario Monti, Konrad von Finckenstein, and others about how to get the GCN moving. We hope to "launch" the GCN next Spring.

In my view, the GCN should be a venue where senior antitrust officials from developed and developing countries formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement. (I would not exclude any antitrust agency that is prepared to participate meaningfully in the GCN's work.) The GCN's general approach to issues should be as practical and concrete as possible; it should avoid abstract discussions that are unlikely to lead to improvements in the practice of antitrust enforcement. Unlike OECD, WTO, and UNCTAD, the GCN would not be a "bricks-and-mortar" organization with a permanent secretariat, and it will not deal with trade issues, or even non-antitrust issues that could conceivably be included under the rubric of "competition policy." As I've stated previously, it would be all antitrust, all the time.

GCN meetings would provide a structured dialogue by focusing on only two or three projects at a time. As indicated, I believe it would be appropriate to start with some merger process issues, among other things. These projects would be aimed at developing to non-binding general guidelines or "best practices" recommendations. Where the GCN reaches consensus on particular recommendations, it would be left to governments to implement them voluntarily, through unilateral, bilateral, or multilateral arrangements, as appropriate.

The private sector should play an important role in the GCN. However, because the goal of the GCN is to promote convergence of *government* procedures and enforcement policies, it would not be appropriate for the private sector to be involved in the GCN's decision-making functions. But I would expect that legal and economic antitrust practitioners, academics, and businesspeople will help the GCN to identify projects, participate in GCN information-gathering exercises, and share their views on how GCN projects should proceed and where they should lead. In addition, I hope that international organizations will provide appropriate input.

That brings me to a question relevant to our meeting today: how should the GCN relate to this Global Forum on Competition? In my view, the two exercises are very compatible; they should play quite different roles in the international conversation on antitrust, yet they should be mutually reinforcing.

As have explained, the GCN will focus on narrowly-defined issues that we hope to resolve (or make progress on) in a relatively short time, at least by the usual standards of multilateral exercises. In contrast, I understand that the purpose of the Global Forum on Competition is to bring together a limited number of developed and developing countries to share experiences on broad range of antitrust subjects, such as those we will discuss later today and tomorrow. These subjects are not necessarily controversial, and those that are may not be good candidates for seeking consensus in the near term. On the other hand, it may well be that the dialogue in this Global Forum on Competition will provide valuable input to GCN projects, or develop issues for consideration by the GCN. Similarly, many of the the discussions in the GCN should enrich related discussions here. These two exercises can be partners, not rivals.

Conclusion

The world has come to understand that antitrust enforcement has an important role to play in national and global marketplaces. We should be gratified by that. The antitrust community has come to understand that cooperation between and among antitrust agencies must play an essential role in sound law enforcement. That also is a very good thing.

But we have now recognized something else: that some of the procedural and substantive differences among us do matter, to us as agencies, to the businesses whose conduct we review, and to the consumers we serve. Many of those differences cannot reasonably be expected to disappear solely through strong enforcement cooperation. For that we need new, broadly-based mechanisms devoted exclusively to real problems of antitrust enforcement. We need a Global Competition Network, and we need this Global Forum on Competition. Thank you for your attention.

Presentation Paper
1st OECD/GFC, Paris

The Role of Competition Policy in Economic Reform - Based on the Korean Experience -

October 2001

Nam-Kee Lee
Chairman
Korea Fair Trade Commission

< Opening >

Esteemed guests and ladies and gentlemen,

Let me first express my deep appreciation to the staff of the OECD and CLP who worked so hard to organize this historic forum on competition policy. It is a great honor for me to speak to this distinguished audience at the 1st GFC on the topic of the role of competition policy in Korea's economic reform.

Before I delve into the Korean experiences, I would like to start with **<The Role of Competition Authority in the Development of the Market Economy>**

Generally, in a narrow sense, conventional competition policy is regarded as the enactment and enforcement of competition laws that regulate anti-competitive practices.

In a broader sense, however, competition policy encompasses more fundamental aspects of economic policy, aiming at the promotion of market principles throughout the entire economy. For example, competition policy includes regulatory reform policy which eases market entry barriers and guarantees equal business opportunities to market participants; injecting market principles into the process of privatization of state-run enterprises; playing the role of competition advocate in order to ensure sectoral policies follow market principles ; and developing a culture of competition by instilling a competition mindset into the players in the market.

Competition policy, in this sense, can be a very effective strategy for economic reform.

I believe that competition authorities, as pioneers of reform, need to focus on fulfilling more comprehensive policy objectives. To attain successful development of the market economy, simple enforcement of competition laws will not suffice. This holds particularly true for a country in the early stages of adopting competition laws. The antitrust authority needs to disseminate competition principles throughout every corner of the economy as well as enforce competition laws. I believe that a developed market economy and balanced growth can only be achieved when all the players--the government, the private sector, and consumers--become competition-minded.

With this background, I would like to move on to **<Korean Competition Policies in the process of Economic Reform :** particularly**, Experiences and Lessons>**

During the 1960's and 1970's, the Korean economy was led by the government that employed an unbalanced, export-driven growth strategy. As a result, Korea attained remarkable achievements, including a 30-fold increase in the size of the economy and a 20-fold increase in national income over just two decades.

However, those two decades were also characterized by policies that emphasized governmental protection and intervention,

rather than competition in the domestic market. On top of that, there was very little foreign competition. The very dearth of competition led to distortions of market functions. Monopolistic and oligopolistic market structures and a concentration of economic power became prevalent.

In order to address those problems, Korea embarked on economic reforms and shifted its policy direction in the early 1980's. The new policy line consisted of three pillars: autonomy, stability, and openness. Autonomy means stimulating competition in the domestic market, while openness refers to introducing foreign competition. It was also during this time that competition laws and the KFTC were established in Korea.

Over the last two decades, the KFTC did not limit its role to the traditional scope of competition policy. Not stopping at simply enforcing competition laws, the KFTC made steady efforts to spread the principle of competition throughout the economy.

For one, the KFTC assumed the role of competition advocate, so that government agencies would incorporate the principle of competition in their policies. Under the general competition law of Korea, each government agency is required to consult with the KFTC prior to enacting or revising any laws and decrees which could restrain competition. Thanks to this legal mechanism, many anti-competitive regulations have been filtered out. For example, in the fiscal year of 2000, 481 legislative measures were examined by the KFTC and 51 were revised upon advice of the KFTC.

In addition to filtering out regulations prior to enactment, the KFTC examined and revised regulations already in force. From April 1997 through 1998, the KFTC operated the Committee on Economic Regulatory Reform and the committee successfully performed far-reaching reform despite pervasive and deep-seated resistance. The activities of the committee also helped spearhead this reform drive throughout governmental agencies.

Moreover, during the process of the privatization of state-run enterprises, the KFTC acted to increase competition and ensure that privatization did not end up merely changing public monopolies into private monopolies.

As such, the KFTC has faithfully carried out economic reform by disseminating the principle of competition. I believe this role and function of the KFTC is bolstered because the chairman of the KFTC, as a regular member of the cabinet, is entitled to advocate competition perspectives during the process of major policy making.

The financial crisis that struck Korea at the end of 1997 has provided Korea with an opportunity to re-examine its overall economic policies. In this process of reflection, the importance of competition policy has been often highlighted. The crisis came about mainly because Korea failed to establish an efficiently functioning market system and maintained government-dependent industrial policies inherited from the development era. All the economic players have learned that market-led innovation is essential to enhance efficiency throughout the government and business sectors.

All things considered, let me dare to say that Korea's antitrust enforcement has been successful and contributed to the economic reform. I believe a number of factors have helped bring about this success.

First, as mentioned earlier, the KFTC did not stop at simply enacting and enforcing competition laws, but extended its reach to solidify the market economic system. Second, the competition authority maintained its independence so that it could enforce competition laws rigorously and consistently within the framework of laws and principles. Third, the KFTC was successful in developing a social consensus on the importance of competition policy throughout the public and private sectors. Fourth, the unyielding spirit of the KFTC has played a role. Instead of succumbing to opposition and resistance from interest groups and other ministries, it successfully coped with the conflict and tension that always arises in the course of reform.

However, I admit that there are some areas where improvements are needed. The KFTC should have played a stronger role in the introduction of foreign competition and it also has to cope with the new challenges arising from globalization and the digitalization of the economy. In the future, the KFTC intends to intensify its commitment to addressing these challenges.

<Closing>

Ladies and gentlemen,

A market economy is like a living organism. For the market economy to become healthy and strong, constant economic reform needs to be pursued, which entails tremendous challenges and difficulties. We are all aware that competition authorities cannot do this job alone. However, at the very least, the competition authority needs to take the initiative because no other agency will tackle this noble task.

Allow me to close my remarks by thanking you once again. I sincerely hope that the Korean experience provides some useful lessons and serves as a guide for nations shifting toward a market economy. Thank you for your time and attention.

INCORPORATING COMPETITION PRINCIPLES INTO REGULATORY REFORM PROGRAMS
(Experience of Russia)

Speech to the OECD Global Forum on Competition

Paris - 17 October 2001

Ilya Yuzhanov,
Minister for Antimonopoly Policy and Enterpreneurship Support,
Russian Federation

The national economy is currently growing at a rate of 5 to 6%, after 9% last year. I believe this high growth is due to the economic reforms now under way in Russia. One of the broad principles underpinning this reform is the development of competition. Establishing transparent, stable rules for economic activity to stimulate the business world is one of the main planks of Russian government policy. In practical terms, this determination is reflected in our Medium- and Long-term Government Programmes.

1. Government policy on institutional restructuring is aimed at creating an open economy and an environment in which every enterprise enjoys the same opportunities. This policy, with its strong pro-competition focus, gives the ministry in charge of competition policy ("MAP Russia") an active role in policy formation and delivery. In this new environment, the competition authority is no longer an institution that merely notes breaches of the law and takes action to prevent them. Increasingly, its task is to rid the business environment of conditions that are conducive to such breaches and have been generated by market or government policy failures in specific sectors of the economy. MAP Russia is also stepping up its involvement in economic policy formation.

2. MAP Russia is increasingly involved in protecting competition. Its activities are wide-ranging and cover, for instance, the application of the principles of competition to the reform of natural monopolies and the new mechanisms set up to regulate them, as well as work to amend the legislation so as to remove red tape and do away with administrative barriers to entrepreneurship.

3. In 2001, Russia has been making substantial headway on reform in the natural monopoly sectors. After heated discussions and intense preparation, the Government of the Russian Federation adopted the Programme of Railway Reform for the period up to 2010 (Decree No. 384 of 18 May 2001) and outline reforms of the energy sector in the Russian Federation (Decree No. 526 of 11 July 2001). MAP Russia has succeeded in ensuring that these reforms, as well as work to enhance regulation in this branch of the economy, are based on the rules of competition. The reform of the railway sector separates state management from commercial activities subject to competition (both currently in the hands of the Ministry for Railways), maintains the unified state railway infrastructure under centralised traffic control, promotes competition in the field of railway transport following the separation of commercial activities from the monopolistic structure, and creates independent transport and service companies. In the power sector, the main purpose of the reforms has been to promote competition in the field of power generation and transmission. Competition has been introduced by restructuring the natural monopoly (now the RAO "UES") and selling off subsidiaries in the power generation and transmission sector to independent investors. The reforms also separate natural monopoly sectors (grids and infrastructure) from commercial

operations, the separation occurring simultaneously with the reform and liberalisation of state regulation. We are currently drawing up proposals for the reform of the gas industry which we hope will be based on the same rules of competition.

4. The competition authority's role in the process of change affecting natural monopolies is not confined to drawing up programmes of reform. MAP Russia monitors the situation on an ongoing and even daily basis in branches of the economy deemed to be natural monopolies. The Ministry's aim is to ensure fair behaviour on the part of market operators, guarantee non-discriminatory access to supply infrastructure services and crack down on abuses of dominant positions on federal and local markets. When controlling economic concentration, the Ministry applies the principle that no enterprise may be set up to operate simultaneously in the natural monopoly and commercial sectors. We also try to limit the scope for individual companies or groups to achieve dominant positions. In order to fully implement these rules we are drawing up amendments to our legislation.

5. MAP Russia, in conjunction with the Ministry for Economic Development, has drawn up a raft of laws on de-bureaucratisation, aimed at liberalising economic life, facilitating market access for enterprises and re-organising state regulation. During its Spring 2001 session, the State Duma adopted Federal Acts "on the licensing regime for specific types of activity, "on government registration of legal entities", "on the protection of rights of legal entities and private entrepreneurs during state inspections". These three Acts were approved by President Vladimir Putin on 8 August 2001. They considerably facilitate and simplify enterprise registration and licence delivery. They lay down the principle of "one-stop shops", reduce the number of types of activity requiring licences, restrict scope for state intervention in business activities and establish a legal framework that protects enterprises from illegal action by executive bodies and state officials. At the same time (and always with the active involvement of MAP Russia), major amendments have been made to the Federal Act "on public companies". Other amendments under way are aimed at implementing general business management rules and the protection of shareholders' rights.

6. On 8 June last, a Governmental Decree of the Russian Federation (No. 452) established a State Commission to remove red tape and optimise federal budget expenditure on state management. The Commission has a broad advisory role in the above fields. Chaired by the Deputy Prime Minister, it includes two members from MAP Russia (the Minister and one of his deputies). The Ministry's involvement in the work of the Commission gives us the opportunity to contribute actively to the enhancement of state management and the process of regulatory reform. There is also the Enterprise Council reporting to the Government of the Russian Federation (established by Government Decree No. 581 of 5 July 2000), which provides an effective link between government and the business world. The Council is chaired by the Prime Minister of the Russian Federation, with the Minister for Antimonopoly Policy and Entrepreneurship Support as Deputy Chair. The Council brings together key figures from the Russian business world and government ministers with economic responsibilities. The Council now has a section on Small- and Medium-Sized Enterprises (Decree No. 523 of 9 July 2001). It is chaired by the MAP Minister of Russia, thereby enabling the interests not only of major enterprises but also of small- and medium-sized enterprises to be taken into consideration when conducting economic reform.

7. The process of enhancing the legislation regulating economic activities continues apace. However, Russian businessmen are still reporting cases of illegal conduct on the part of executive bodies. In such cases, these businessmen are given a rare opportunity to defend their interests and their rights, not only before the courts but also before the competition authority. This is because one of the features of Russian competition law is its application to both commercial enterprises and executive bodies. The law does not allow executive bodies, whether at federal, regional or local level, to vote any decisions, commit any act or draw up any agreement that might distort competition (such as restrictions on market access, unwarranted preference shown to individual enterprises, and barriers to the free movement of goods).

Upon finding evidence of such conduct, MAP Russia is authorised to demand that these anti-competitive acts and decisions be rendered null and void.

Thus MAP Russia is helping to enhance all state regulations by enforcing compliance with the rules of competition throughout the economy.

We in the Russian Federation no longer say "noblesse oblige" but "competition oblige".

Speech by Minister Arun Jaitley

In India, we are still in the process of drafting a new competition law. We have been traditionally government regulated by a whole piece of legislation which was the Monopolies and Restrictive Trade Practices legislation. Over the last 25 years, we have constantly evoluted. At the same time, there has been an increased recognition that the enormous amount of regulation in India has become anachronic. Two years ago, we started a process of debating a new competition policy. After an extensive debate, the draft competition legislation has been framed; it is now before the Parliament. Hopefully, very soon, it shall become an enforceable piece of legislation. In the course of my brief comments, after referring to the need for competition law itself, I will deal with some of the important roles and tools of the competition authority,

Competition has been conceived as an amalgame of factors that stimulate economic competition. Competition now needs to be viewed as a dynamic concept as it attempts to judge forms of industrial organisation and policies of firms by reference to the extent to which they promote rivalry. Competition describes the kind of market pressures which may be exerted to penalise the inefficiencies and reward the enterprises and in this way to promote economic progress. One of the government economic themes in the last quarter of the century has been the process of globalisation and a progressive international integration in the world economy. The movement is towards widening. International flows of trade enhance information in a single integrated global market. Globalisation has the fundamental attributes of increasing the degree of openness in most countries.

The underlying rational for globalisation is that free flows of trade, finance and information will produce the best outcome for the growth and global welfare. However, it is inevitable that globalisation makes initially an unequal world with winners and also losers. It follows therefore that, if a proper check and balances is not being done and if complementary policies are not in place, accrued welfare and income gains across the countries may wait. Liberalisation and globalisation have characterised international activities in these times. Consequently, at the micro level, firms to remain competitive are now required to adopt global strategies. As the number, size and scope of activities of these firms increase, more and more of them are adopting strategic alliances and their commercial practices have an increased international dimension more than ever before. Theses processes are resulting in an increased cross-border trade and, at times, in anticompetitive behaviours.

Such practices, if not checked, will tend to undermine the benefits of liberalisation for the countries concerned. Often trade policies and competition policies may not be in tandem. It is important for every country that straight competition policies are directed towards economic growth and development whilst observing consumers interests. Trade laws and policies are primarily used for balancing the trade and export policies of other countries in response to the demand of domestic industries. On the other hand, the very basic gamut of competition policies is in the interest and welfare of consumers with an effcient allocation of scarce resources. All trade ultimately has the consumer at its converging point. Consumer welfare and their interests are at the centre of economic liberty. It is designed for preserving an effective competition as a rule of trade, the premises of which are unrestrained interaction of competitive forces, maximum material progress through rationale allocation of economic resources and availabiliyty of goods

and services of acceptable and good quality at reasonable prices and, finally, are just a fair deal to the consumers.

We, in India, are close to enacting a new competition law. Presently, the draft law is before our Parliament. Hopefully, it will become law not before long. Our basic approach to competition law and policy is predicated on the following principles, even though we are still designing some of the contours. Firstly, competition should be a factor to be recognised in trade and other policies of the country. Secondly, there should be a competition policy and enforced competition law structured according, by and large, to the consumer interests and consumer welfare. There should be a competition authority to implement the competition law and also to facilitate the shape of competition law from time to time. Thirdly, the trade policy of the country should be, at all times, in the reckon of the contours of the competition law and policy. There should be enough flexibility in the competition and trade policies to deal with the specific needs and requirements of the country. Fourthly, public interest's dimensions can have primacy over consumer interests in exceptional circumstances. Such exemptions and exceptions, however, should be reviewed and not be allowed to dilute competition as far as possible. Care should be taken not to allow public interest to be abused to circumvent competition. Lastly, competition policy should be an aid to the development dimension in its approach and implementation.

While keeping all these factors in mind, the draft approach that we have taken as far as India is concerned is to have effective implementation of the competition law and enforcement of competition policy through a competent judiciary body that is the competition authority. The functions of the authority as it is ruled are intended to encompass several different functions. Most competition laws like ours will have the rubrics of a) the anticompetition agreements ; b) abuse of dominance ; and c) the market surveillance. Our original regulatory law did refer to a large number of market practices which were anticompetitive.

They have now been redefined under the new legislation. We have a whole chapter dealing with anticompetitive agreements (both horizontal and vertical). There are four agreements in the horizontal category which are *per se* referred to as anticompetitive : these are agreements : i) regarding prices (all agreements that directly or indirectly fix the purchase or sell prices) ; ii) agreements regarding quantities (these are agreements limiting production, supply, markets, technical development or investment) ; iii) agreements regarding tendering and bidding and iv) agreements regarding market sharing (these include agreements for sharing of markets or sources of production supplied by territory, type or size of consumers or any other way).

While these agreements are described in the draft law as *per se* illegal, there would be others that would fall under the agreements category but treated according to a *rule of reason*. Similarly, we have a detailed chapter on vertical agreements. There is a considerable debate in our country on another component : will judicative authority be given to the competition authority with regard to abuse of dominance? The criteria for dominance in view of the specific character of our markets are under considerable debate. We have for the time being several questions raised with regard to the kind of methodology of determining dominance and what exactly could be described as an abuse of dominance. We have in our draft laid down certain grounds rules which will be the size and resources of the enterprise, the size and importance of competitors, the economic power of the enterprise including commercial advantages, technical

advantages enjoyed by the enterprise, dependance on consumers, monopolies or dominance factors, entry barriers, countrervailing buying powers as well as some other relevant factors which themselves will determine the factors of dominance. Our original old law, which was the Restrictive Trade Practices and Monopolies law perhaps dscouraged size. There is a substantial change as far as the new draft is concerned. It is not the size of dominance *per se* which is discouraged but it is the abuse, that is the ability to operate independently of market forces which will be discouraged by the law.

The third aspect regards merger control. In our domestic market, there is a considerable debate as to the extent to which we must enforce the law. In a market like ours we needed to encourage mergers in a big way. We therefore had a fairly liberal approach in the form of the size to which the notication of the merger would appply. We now have a provision with regard to an advanced ruling which any merging enterprise may seek. There is a time frame of 90 days in which the advance ruling is required to be given. In case the effects of a merger are to significantly eliminate or to have an adverse effect on competition, the authority can then examine this question within a time period limitation of one year, which is provided itself in the draft legislation.

There is a considerable amount of advocacy function in the initial stages which are also assigned to the Commission because the market needs to be educated in a developing economy like ours on the whole culture of competition itself. We do therefore intend that, sooon after the legislation comes into force and prior to its enforceability, a certain time period will exist in which the Commission would initially perform its educational function of promoting a culture of competition in the market.

The role and tools of the competition authority are also very clearly defined. The investigative tool is considered distinct from the prosecutoral tool. There is a punitive tool. There is no provision now with regard to leniency but we are now also in the process of studying various models in the world. In addition, I have initiated a domestic debate in India with regard to the need of discussing the possibility of including leniency provisions either in the first instance or at a subsequent stage after the law itself develops.

As I mentioned earlier, we have now been shifting from a more regulated economy towards market economy . We had a regulatory law. Realising the need for promoting competition vis à vis experiences of various international models, we have been studying and educating our markets on the need to encourage competition. It will certainly be in a position to provide the best in terms of pricing and in terms of quality as far as the consumer is concerned.

Session II.

The Roles and Tools of Competition Authorities in Implementing Reform

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

14-Mar-2002

English text only

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OECD Global Forum on Competition

CONFORMITY CONTINUUM

-- Presentation by Robert A. Morin, Competition Bureau, CANADA --

This note was submitted by Canada as a contribution to the Global Forum on Competition (17-18 October 2001).

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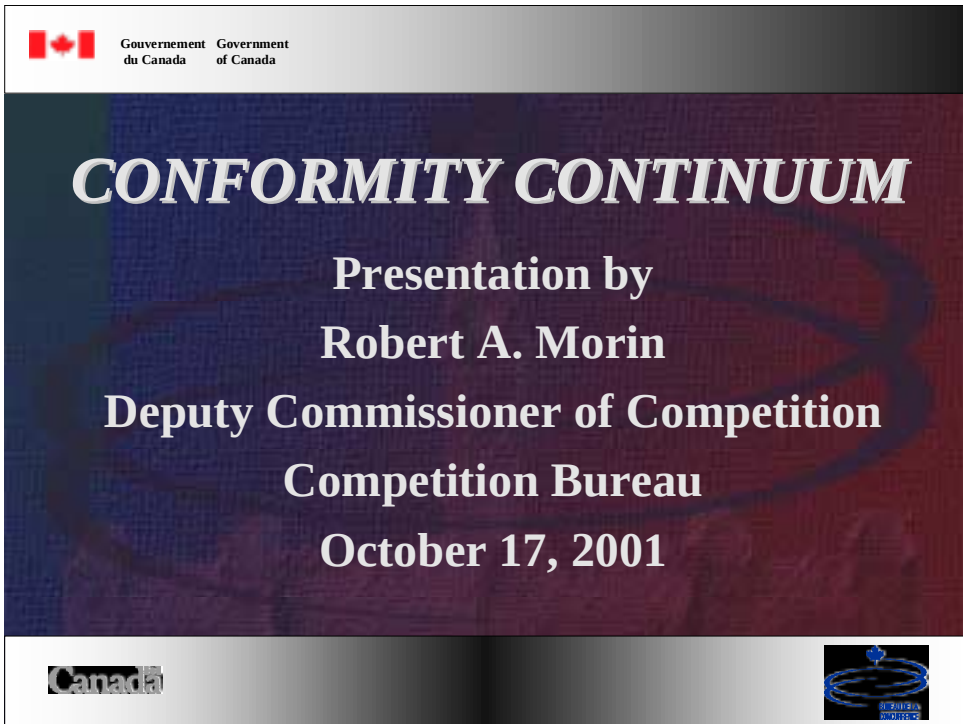
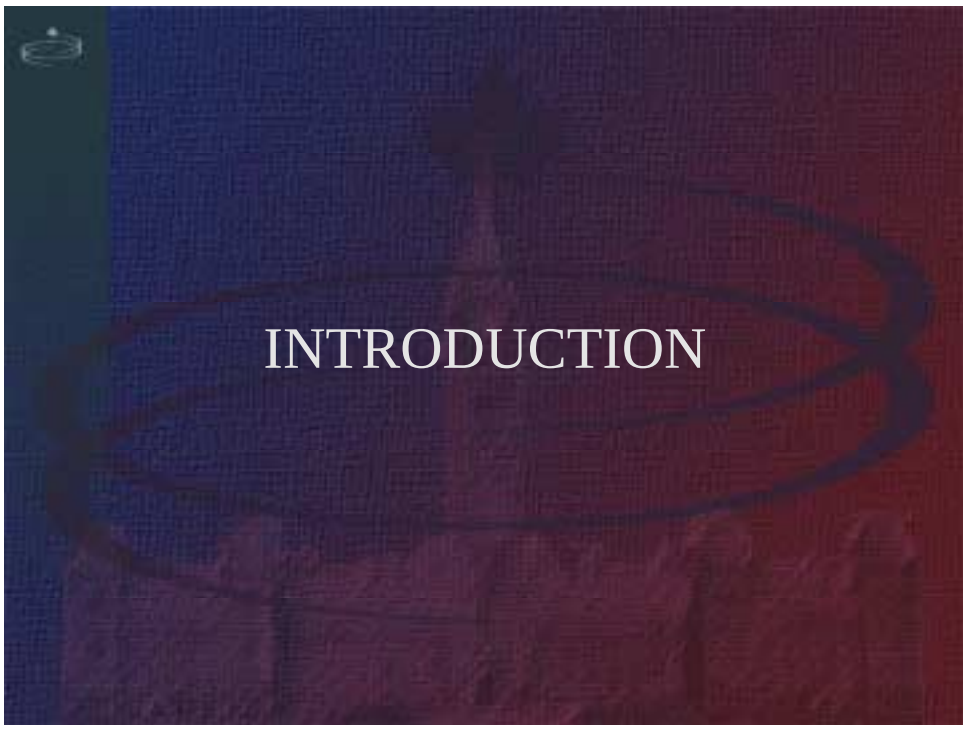
English text only


Gouvernement du Canada
Government of Canada
CONFORMITY CONTINUUM
Presentation by
Robert A. Morin
Deputy Commissioner of Competition
Competition Bureau
October 17, 2001
Canada


INTRODUCTION

FIVE PRINCIPLES

Transparency

Fairness

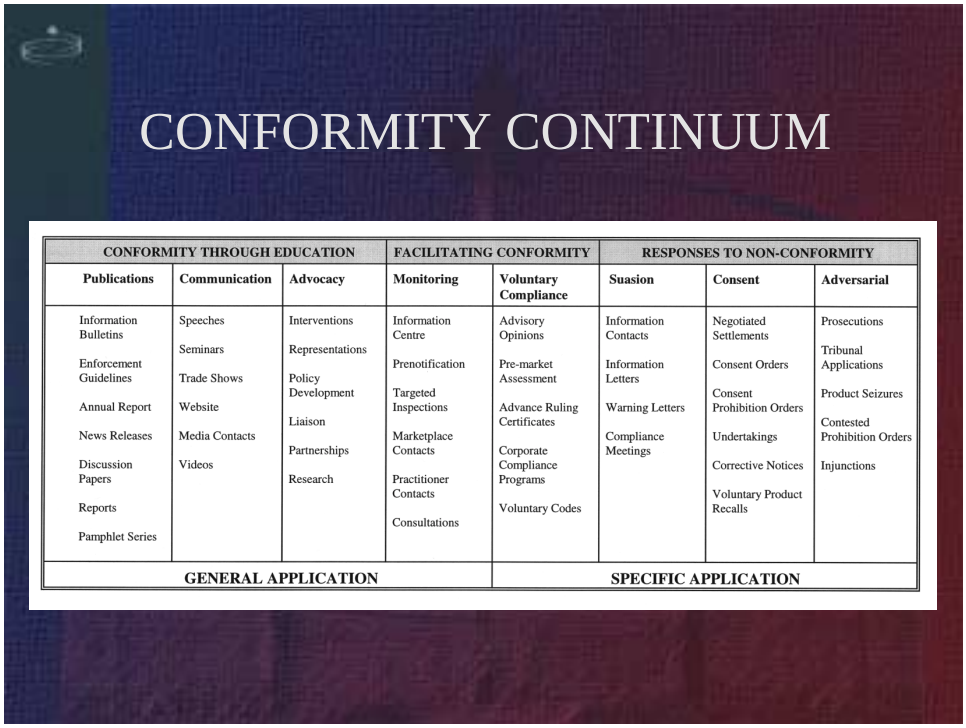
Timeliness

Predictability

Confidentiality

CONFORMITY CONTINUUM I

- *Information Bulletin on Conformity Continuum* - issued June 2000
- Provides graphic and textual summary of Bureau approach to enforcement and administration of *Competition Act*
- Constituent parts have evolved over past several years in response to changing environment



CONFORMITY THROUGH EDUCATION			FACILITATING CONFORMITY		RESPONSES TO NON-CONFORMITY		
Publications	**Communication**	**Advocacy**	**Monitoring**	**Voluntary Compliance**	**Suasion**	**Consent**	**Adversarial**
Information Bulletins Enforcement Guidelines Annual Report News Releases Discussion Papers Reports Pamphlet Series	Speeches Seminars Trade Shows Website Media Contacts Videos	Interventions Representations Policy Development Liaison Partnerships Research	Information Centre Prenotification Targeted Inspections Marketplace Contacts Practitioner Contacts Consultations	Advisory Opinions Pre-market Assessment Advance Ruling Certificates Corporate Compliance Programs Voluntary Codes	Information Contacts Information Letters Warning Letters Compliance Meetings	Negotiated Settlements Consent Orders Consent Prohibition Orders Undertakings Corrective Notices Voluntary Product Recalls	Prosecutions Tribunal Applications Product Seizures Contested Prohibition Orders Injunctions
GENERAL APPLICATION			**SPECIFIC APPLICATION**				

APPROACH

- Expanded
- Targeted
- Transparent
- Bureau-wide
- Tool-box of instruments

ADVANTAGES / BENEFITS

- Better informed staff
- Better informed stakeholders
- Greater opportunities for partnership
- Targeted response to non-compliance

THE CONTINUUM AT WORK

- Real life examples
  - Agricultural herbicides
  - Refined petroleum products

CONCLUSION

- Importance of integrated and balanced approach
- Effective use of resources

Unclassified **CCNM/GF/COMP/WD(2001)17**

Organisation de Coopération et de Développement Economiques
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OECD Global Forum on Competition

CONTRIBUTION FROM CHINESE TAIPEI

-- Building on Competition Culture (Session II) --

This contribution was submitted by Chinese Taipei as a background material under Session II for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

JT00113951

English text only

CONTRIBUTION TO SESSION II

By Dr. Hwang, Tzong-Leh
Chairman, Fair Trade Commission
Chinese Taipei, Taiwan

Like many economies in their early stage of economic development, Chinese Taipei used to regulate the economy in a heavy-handed manner. But the successful economic growth of the economy and changes in global trading environment of the last few decades initiated the call for transformation into a free market to sustain a further economic stability and prosperity. In a series of economic reforms starting from 1980s, the enactment of the Fair Trade Law (the "Law") in 1992 signifies a milestone in the progressive transition and lays the foundation for the acceleration of the transition.

Based on its past experience in implementing other economic laws, the government has foreseen that sound and effective enforcement of the Law rely on sufficient awareness among the business communities, the government agencies, the academic, and the general public who are all major players in market economy. Recognising that a competition culture needs to be built among these players when the Law was first enacted, the Fair Trade Commission (the "Commission") identified this mission as one of its priorities to ensure the efficiency and quality of enforcement work.

To better explain the Commission's efforts in "building a competition culture", the presentation will be made in the following three ways: strengthening public awareness, improving regulatory environment, and promoting research on competition issues.

1. Strengthening Public Awareness

An important function of the Commission is to conduct compliance educational programs aiming at encouraging the business communities to comply with the Law when formulating their business strategies. Another mandate of the Commission is to help the general public to understand what the Commission does for them and request them to support the Commission's enforcement work. The Commission conducts public compliance education activities through the following means to ensure broad coverage:

(a) To provide up-to-date enforcement information through the mass media, including radio, television, and the press, to advertise on public transport, and to release publications on the enforcement strategies, priorities and achievement;

(b) To brief to the press on a weekly basis on the decisions of the Commissioners' Meeting and hold special media conference where urgent matter arises such as undue pricing during natural disaster or pyramid selling scheme, to attract attention of the relevant businesses and the general public;

(c) To administer external liaison programs to enhance communication, including two regional enquiry offices where staff handle calls and visits from the general public, the enquiry offices handle more than 10,000 calls annually;

(d) To convene workshops, over 1000 by September 2001, for all kinds of business activities in conjunction with trade associations and other bodies;

(e) To conduct 36 or 72-hour lecture programs for managerial-level employees of firms, providing focused discussions on aspects of the Law, the Commission has graduated 28 "classes", bringing the number of "graduates" to over 1,550 by September 2001;

(f) To adopt business correction programs to issue warnings and corrective measures on an industry-by-industry basis when certain improper trade practices are found to cut across entire business sector, the Commission has issued business correction programs on 35 sectors, including the real estate and the Cable TV industries; and

(g) To response to the business communities' request to help firms to establish frameworks for self-compliance so as to avoid violations to the Law.

2. Improving Regulatory Environment

Chinese Taipei used to regulate the economy in a heavy-handed manner. Despite the passage of the Law, before 1999, the provisions of the Law were not applicable in areas where other legislation already applied. In this regard, the Commission devoted numerous resources to minimise this exemption and to create a regulatory environment which fits into the spirits of market economy. The Commission has:

(a) Always advised the regulatory agencies during the formulation and development of laws, or consulted with government agencies to revise or repeal the existing laws so as to ensure compatibility with the spirit of market economy;

(b) Established a task force in 1994 to investigate and examine all the existing other laws that provided a legal basis for exemptions under the Law. The task force had held 19 meetings with responsible government agencies to review such other laws and reached consensus that a total of 122 provisions in 74 laws should be amended. The review and consultation work have been integrated into the Commission's on-going effort;

(c) Set up a deregulation task force in 1996 to identify and remove unnecessary or undue regulatory control, to review and to assess competition in highly concentrated markets, and to identify and review trade and investment barriers. The Commission then listed initial findings in the Cable TV, the telecommunications, the petroleum and many other sectors, released sector specific guidelines to clarify the Commission's regulatory approach under the Law, and drawn up reform plans for the Cabinet; and

(d) Closely monitored the regulatory reform of public utilities such as telecommunications and the energy sector to prevent misuse of dominant position, cross-subsidisation and undue pricing of the incumbent. The Commission has been co-operating with the regulatory bodies to introduce competition provisions to restructure state monopolies into competitive ones and to co-regulate them in a newly de-centralised market situation.

In 1999, the Law was substantially amended. One of the new provisions requires that the Law should not be applied to acts performed in accordance with other laws only if such other laws do not

conflict with the legislative purpose of the Law. The amendment thereby affirms the spirit and content of the Law to be the core of the economic policy.

3. Promoting Research on Competition Issues

The Commission has placed much importance on the improvement of enforcement quality. In order to improve the Commission's work, much attention is devoted toward the exchange of knowledge with the academic and to strengthen co-operation with counterparts overseas, so as to draw on their expertise and to help review the work of the Commission. The Commission thus

(a) Requests scholars and experts to do researches on developing issues, convenes an annual workshop to address the research results and to receive comments from the academic and the public;

(b) Publishes the academic journal – Fair Trade Quarterly, and awards scholarship to graduates majoring in competition law related topics so as to encourage the academic to devote themselves into this newly developed area;

(c) Holds liaison meetings periodically with the prosecutors and judges, to exchange views on the concepts of competition laws, to harmonise the difference between the dual-track systems of the administrative and the judicial, and to co-ordinate the enforcement work where appropriate;

(d) Convenes international conferences regularly to review the enforcement work the Commission has achieved, to compare the philosophies and the methodologies that different authorities adopted, and to explore developing and common issues with foreign competition authorities and international organisations;

(e) Establishes the Competition Policy Information and Research Center to strengthen communications with the academic and to serve as a focal point for studying competition laws and policies. The Center currently, among other works, holds speeches on competition issues twice a month and publishes newsletter on the work of the Commission;

(f) Participates in international conferences to keep abreast with the global trend, holds bilateral talks with foreign counterparts regularly to exchange knowledge and experience on competition issues, and conducts staff visits and exchange programs to enhance mutual understanding;

(g) Sponsors the establishment and maintenance of the APEC Competition Law and Policy Database to pursue the collective goal of the APEC member economies in strengthening transparency of competition law and practices to help the business communities within the APEC region; and

(h) Conducts technical assistance programs annually together with the OECD CLP Division for competition authorities in Southeast Asian countries, to facilitate the development of their own competition culture.

The above illustrates three methods used by the Commission in promoting a competition culture. Still, by the end of August 2001, the Commission has processed a total of 21,584 cases, an indication of the fruitful results in cultivating the competition culture. The cases consist of 13,839 complaints filed by private parties, 2,017 requests for interpretation of the Law, 5,625 applications for merger approval, and 103 applications for cartel exemption.

4. Conclusion

Following the development of the economy and the transformation of economic structure, the awareness of competition culture and the enforcement of competition law become vital for realising benefits of market economy. To smooth and accelerate the transition, a process of adjusting market players' mentalities and behaviours constitutes what we called building a competition culture.

According to the experience of this Commission, only when the business communities, the government agencies, the academic, and the general public are actively involved, can we make competition law and policy effective. This will in turn benefit those major players from a well-functioned market economy and increase consumer's welfare and economic stability.

The figures provided on the Commissions' enforcement work are a reflection and demonstration of the general public's reliance on the Law and the Commission for a protection of their interests. The experience in building a competition culture has shown to be a positive one. Chinese Taipei will continue to devote its efforts in nurturing this culture.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

09-Oct-2001

English text only

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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Unclassified

OECD Global Forum on Competition

CONTRIBUTION FROM INDONESIA

Promoting Compliance and Education Business about Competition Law
-- (Session II) --

This contribution was submitted by Indonesia as a background material under Session II for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

JT00114187

English text only

PROMOTING COMPLIANCE & EDUCATING BUSINESSES ABOUT COMPETITION LAW: INDONESIA'S EXPERIENCE
(-- Session II --)

Introduction

In addition to creating the Commission for the Supervision of Business Competition ("KPPU"), Indonesia's first agency charged with investigating and enforcing the nation's new competition law, Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition tasks the KPPU with educating businesses and the public about the competition law and promoting compliance with the law.[1] As described below, Law Number 5's "socialisation" process started well before the law actually came into effect, and the need to educate businesses, the public, the press, and the courts about the law likely will need to continue for many years to come.

The purpose of this paper is to review some of the activities that already have been undertaken in Indonesia to promote the socialisation of, and compliance with, Law Number 5. It is also hoped that this paper, in conjunction with discussions during the course of the OECD Global Forum on Competition, will spur additional ideas about how law enforcement agencies might best develop programs to educate business and others about the existence and meaning of competition law in a systematic, continuous, on-going manner.

Background on Law Number 5 of 1999

Law Number 5 of 1999 is Indonesia's first comprehensive law prohibiting monopolistic practices and unfair business competition. Prior to its passage on March 5, 1999, legal provisions touching on competition were fairly limited in scope and could only be found as snippets of law scattered throughout numerous codes and statutes, including both Indonesia's criminal and civil codes.[2]

The interest in developing a comprehensive competition law in Indonesia dates back to around 1990. It was at this time that legal scholars as well as members of various political parties, non-governmental organisations, and certain government institutions began to discuss the need for such a law. In fact, a number of different groups, including the Indonesian Democratic Party and the Indonesian Ministry of Trade (in co-operation with the Faculty of Law University of Indonesia), produced draft competition laws. These proposed draft laws, however, were not given serious attention by those in power at the time, because much of the unfair business competition and monopolistic practices that was taking place, often by Indonesia's largest industries and businesses, was the result of direct and active government support. Crony capitalism was the order of the day under the so-called "New Order" government of former President Soeharto, right up to about 1998.

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1 See, for example, Law Number 5, Article 30 (1) (establishing the KPPU to supervise the implementation of Law Number 5) and Article 35 f (giving the KPPU responsibility to prepare guidelines and publications related to the law).

2 See, for example, Criminal Code of 1945, Article 382 bis (concerning fraud and unfair business practices); and Civil Code of 1945, Article 1365 (concerning the recovery of damages by private parties for violations of the law).

While Law Number 5's passage in 1999 came about in part to satisfy conditions of a Letter of Intent entered into between the Indonesian government and the International Monetary Fund in July 1998, the law's passage also drew much support from politicians, the government, the public, and the press as a means to address growing concerns about monopolistic practices and unfair business practices stemming from the closely related practices of rampant corruption, collusion, and nepotism (known by the Indonesian acronym "KKN") that had been taking place in Indonesia between the government and favoured businesses.

Law Number 5 was passed by the House of Representatives ("DPR") on February 18, 1999, and it was signed into law by Indonesia's President on March 5, 1999, with an effective date of March 5, 2000. The competition law's effective date was purposely set one year after its passage in order to provide time for socialisation of the new law. Moreover, businesses were given an additional six-month grace period under the law, until September 5, 2000, to come within compliance of the law.[3] This grace period undoubtedly was included in the law to give businesses, the public, and others a clear signal that the rules of doing business in Indonesia were about to change -- perhaps dramatically.

Efforts to Educate Businesses Regarding Law Number 5 of 1999

The major activity that the KPPU and the government of Indonesia (primarily through the Ministry of Industry and Trade, Law Number 5's original sponsor within the government), have undertaken to socialise businesses and others about the new competition law has been through the sponsorship of, and participation in, conferences and presentations to various target groups in cities throughout the Indonesian archipelago.

Specifically, conferences have been held with:

1. Universities
2. Industry Groups, Business Associations, and Trade Sectors, including the Indonesian Chamber of Commerce ("KADIN")
3. Local Governments
4. Government Ministries and Institutions
5. General Audiences and the Public

These conferences have taken place in most of Indonesia's largest cities, and some of its regional capitals, including: Jakarta, Surabaya, Jogyakarta, Makassar, Bandung, Medan, Manado, Denpasar, Malang, and Palembang.

The focus of such conferences has been first to simply make the various constituencies aware that Indonesia has a law concerning the prohibition of monopolistic practices and unfair business competition. These meetings included activities as simple as distributing copies of the law. The focus then shifted to more detailed discussions about the law's operative provisions, that is, the kinds of business practices -- such as price fixing, bid rigging, market division, abuse of dominant position, and certain vertical restraints of trade -- likely to draw the most scrutiny by the KPPU. These discussions also covered the general modes of competition law analysis, with specific reference to the concepts of the "rule of reason" and "per se" illegality, and they touched upon some of the more significant economic concepts underlying sound

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3 See Article 52(2) ("Business enactors having entered into agreement and/or conducting activities and/or undertaking actions not complying with the provisions of this law shall be given 6 (six) months from this Law's coming into effect to make adjustments.")

enforcement of competition law, such as market power, barriers to entry, and identifying likely competitive effects. Finally, such socialisation conferences covered the role and organisation of the KPPU, how the KPPU handles investigations and processes cases, and how to properly lodge a complaint with the KPPU.

In addition to conferences sponsored by the government and the KPPU, various private, non-governmental organisations ("NGOs"), such as the Partnership for Business Competition, the Center for Indonesian Law and Policy Studies, and the Center for Strategic and International Studies also have sponsored conferences and workshops targeting many different Indonesian constituencies including businesses and business associations, government organisations, the courts, the press, and the public, to assist in the process of educating interested parties about Law Number 5. These conference typically included the participation of KPPU Commissioners and other government officials, and generally covered the same topics as those identified above. Thus, many socialisation activities in Indonesia have been the product of close, co-ordinated public-private co-operation.

Many of the socialisation activities of the NGOs have been underwritten, at least in part, by international donor agencies such as the U.S. Agency for International Development, Germany's Gesellschaft für Technische's Zusammenarbeit, Australian Agency for International Development, Canadian International Development Agency, World Bank, Asian Development Bank, and others. Given the involvement of the donor agencies, many socialisation conferences have included the participation of notable antitrust scholars and government enforcement officials from the United States, Germany, Canada, Australia, Japan, Korea, and other countries.

Public Hearings and the Dissemination of Decisions

Other important activities that the KPPU has undertaken to socialise businesses and the public about Indonesia's new competition law include public hearings and the public dissemination of the KPPU's decisions.

The KPPU has adopted operating procedures for the conduct of public hearings that are used to investigate highly concentrated industries in which there may be violations of Law Number 5.[4] As part of this process, companies in these highly concentrated industries, together with other industry participants and interested parties, have been invited to appear before the KPPU to give testimony and to answer questions. These sessions have been open to the public and have been well attended by the press and other observers. Such sessions provide businesses and others insights into how the KPPU operates and how the KPPU thinks about and applies the law. To date, such public hearings have taken place in the following industries:

1. Paper and Pulp
2. Wheat Flour
3. Day-Old Chickens

Additionally, the KPPU has adopted the practice of issuing written decisions when it decides a case and then disseminating these decisions in open, public session. Such decisions include: (1) a summary of the evidence collected, including the witnesses who testified before the KPPU and the documents reviewed; (2) the KPPU's findings of fact; (3) the KPPU's conclusions of law; and (4) the sanctions being ordered. The practice of issuing written decisions may not at first appear to be so remarkable, but one must consider that to this day even Indonesia's Courts of Appeal ("High Courts") do

4 See KPPU Decision Number 8 of 2000, concerning "Consultation Meetings."

not issue written decisions most of the time; additionally, the written decisions of the Indonesia's Supreme Court are often difficult to locate, even for Indonesians.

To date, the KPPU has completed two investigations resulting in the imposition of sanctions -- the *Caltex* and the *Indomaret* case. Accordingly, the KPPU has issued two written opinions. The public sessions at which these decisions were read were well attended by representatives from various businesses, the press, and the public.

Socialisation Activities Being Planned

In addition to the socialisation activities described above, the KPPU currently is in the process of planning and developing two additional projects intended to educate businesses and others about Law Number 5. First, the KPPU is planning to develop its own website. Although some materials related to the KPPU and Law Number 5 are currently available on other's websites, most notably that of the Partnership for Business Competition (www.pbc.or.id), the KPPU is interested in developing its own website. Such a site would include copies of all of the KPPU's decisions, the KPPU's internal operating procedures, background information about the KPPU, its membership, and how it is organised, and instructions on how to file a complaint. Much of this material already has been translated into English, and English versions of key materials also would be posted on the site.

Second, the KPPU is planning for the publication of guidelines and instructional pamphlets intended to explain Indonesia's competition law in a straightforward, non-technical manner, for the benefit of businessmen, the public, and the press. Guidelines would be written to cover topics such as cartels and horizontal restraints of trade, vertical restraints of trade, and abuse of dominant position. Pamphlets might also be written explaining how the KPPU is organised, how it does its job, and how to file a complaint about suspected violations of the law.

Conclusion

The socialisation of competition law faces some challenges in Indonesia that make it somewhat more difficult than in many other countries. Although it is not commonly known, Indonesia is the world's fourth most populous county, with a population of over 220 million. Our people, in turn, comprise more than 350 different ethnic groups and speak more than 300 different languages (although most Indonesians also do speak a common language known as "Bahasa Indonesia"). Further, Indonesia is an archipelago consisting of more than 13,000 islands, of which more than 6,000 are populated.[5] These island are spread out over an area of 3200 miles east to west and 1,250 miles north to south (an area significantly larger than the United States). In terms of political subdivisions, the country consists of 30 provinces, which are further subdivided into more than 300 districts and municipalities. Obviously, given these geographic and demographic conditions, effectively getting the word out about the new competition law is a daunting task.

Nonetheless, the KPPU believes that it is up to the challenge. With the assistance of Indonesia's government, NGOs, international, donor agencies, businesses, the press, and the public, we have successfully undertaken the "get-the-word-out" phase of Law Number 5's socialisation. We now are interested in moving into the next phase. Learning about the kinds of activities that other countries -- both developed and developing -- have undertaken to promote the socialisation of their competition laws is one

[5] Most of the population, however, lives on one of Indonesia's five main islands: Java, Sumatra, Kalimantan, Sulawesi, and Irian Jaya.

of the key components of planning for this next phase. In this regard, we are interested in -- and welcome the opportunity to discuss -- ideas of how to develop and implement a sustained, continuous program of socialisation and business compliance, capable not only of building upon our past successes, but capable of ensuring that the people of Indonesia get the benefits of competition that they expect and deserve.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

10-Oct-2001

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CONTRIBUTION FROM KOREA

-- Advocacy role of the Korea Fair Trade Commission in Regulatory Reform - (Session II) --

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JT00114300

English text only

CONTRIBUTION FROM KOREA

ADVOCACY ROLE OF THE KOREA FAIR TRADE COMMISSION IN REGULATORY REFORM - (Session II)

by Nam Kee LEE,
Chairman,
Korea Fair Trade Commission

I. Introduction

Korea's experience on regulatory reform is very unique in terms of its process, institutional arrangement and its outcome. This uniqueness is explained by the KFTC(Korea Fair Trade Commission)'s pivotal role in reforming wide-range of anti-competitive regulations. The current framework on regulatory reform has taken root in the government of Korea successfully by the KFTC's enthusiastic initiatives for facilitating active competition in the market. Another characteristic of Korea is the fact that corporations, consumers and experts group in academia got joined together, which became a prime power for the success of regulatory reform.

Although Korea's regulatory reform has been driven by other ministries since the early 1980s, the result fell short of expectation. The fundamental reason lies in the fact that regulatory reform was on the hands of the engaged industrial ministries which are regulating authorities themselves and likely to be influenced by interest groups.

In the past, the KFTC had concentrated on the enforcement of competition law, such as prohibiting cartels and abuse of market dominant power. However, recognizing that enforcement of competition law alone cannot promise a fully functioning market with the regulations by sectoral ministries, the KFTC turned its attention to the policy sphere of competition advocacy role as the regulatory reform. Only after the KFTC became in charge of designing the overall reform scheme, such an effort resulted in the well-organized institutional arrangement. The KFTC's neutral status, which is not captured by the interest groups, and its know-how which had been accumulated by long experience on market analysis made this possible.

'Committee on Regulatory Reform' under the arm of Presidential office has been the center for pushing ahead continuous and thorough reform, where businesses, consumers, regulatory body, competition authority and experts group get together and cooperatively proceed the reform.

The KFTC, as a Korean competition authority, mainly aims at maximizing the market performances by remedying market failures. In Korea, however, such a policy goal was hard to achieve partly owing to the old entrenched practices in private business sector accustomed to government intervention and guide. In this light, the KFTC was forced to extend its domain as a so-called 'market creator' rather only remained as 'market watcher'. As a consequence, the KFTC, whose primary mandate is enforcing competition law and policy, was forced to extend its concerns to regulatory reform, privatization of SOEs, and intervention to the policy making procedures.

II. KFTC's Resources to Play an Advocacy Role

All the staff members of the KFTC are engaged in the regulatory reform process and the KFTC, with its human resources, has reviewed the governmental regulations which may affect the market. Noticeably, in the year of 2001, "Clean Market Project" was launched as a core policy of the KFTC, with an aim to investigate the violations against the Korean competition law, and carry out the regulatory reform and improve the comprehensive market structure as well. Punishment alone cannot fundamentally improve the market structure and long-time business practices. To overcome these limitations, the KFTC has been conducting in-depth analyses and regulatory reviews in six major markets: private educational institute, information telecommunications, medical pharmaceutic, wedding funeral services and the mass-media such as newspaper and broadcasting industries.

The KFTC established a permanent organization for regulatory reform in the Competition Policy Bureau. This body, from the pro-competitive perspectives, has been reviewing various kinds of regulations imposed by other administrative agencies. The most prominent achievement was the enactment of the Omnibus Cartel Repeal Act(OCRA), which was made public in February 1999. This successful enforcement of the OCRA resulted in the elimination or improvement of 20 cartels, including those that set remuneration for 9 professional occupations such as lawyers, certified public accountants, licensed to accountants, etc.. Although the KFTC once faced with much difficulties in enacting the OCRA, for instance strong resistance from interest groups. However, "the OECD Recommendation on Prohibition of Hard-core Cartels" ('98.4.18) provided backing for this undertaking.

III. Institutional Arrangements

Competition advocacy refers to all the efforts aimed at establishing the principles of a market economy in the government decision-making, enforcement, and deregulation processes. This includes urging public enterprises and corporations undergoing privatization to undertake restructuring measures in a pro-competition manner and eliminating economic regulations that reduce consumer welfare. For the efficient competition advocacy role, competition authorities need to be empowered with the appropriate authorization and resources to have its own voices in the governmental decision making procedure. The KFTC's independent and higher status in the government structure, with its techniques and experience on market analysis, makes it possible to disseminate the competition principles in the process of regulatory reform.

In order to play an effective competition advocacy role, competition authorities should be equipped with the necessary resources and authority. In addition, they should be able to take part in the government decision-making process in a timely fashion.

In this regard, the Korea Fair Trade Commission (KFTC) not only holds the characteristics needed to be an effective competition advocate, but also offers other important capabilities as well.

A. Competition advocacy tool in the government policy making procedure

Institutional arrangements are composed of two dimensions; ex-ante and ex-post ways. Firstly, to block establishing the unduly regulation in advance is more important and effective for ensuring competition than once regulation is established.

1) Consultation on Enact of Acts and Decrees which restrain competition

The Korean Competition Law(Monopoly Regulation and Fair Trade Act) requires other ministries to have prior consultation with the KFTC on whether their proposed acts and decrees have any clause having anti-competitive effects on business, which is very unique as an Competition advocacy role in Korea. As such, Korea's general competition law only stipulates the competition advocacy role of the competition authorities. Such a role is deemed one of the core functions of the KFTC. With respect to the consultations on legislation, in the last year, the KFTC has put forth its opinions on 60 (12.5%) of the 481 requests made by relevant government agencies for the enactment and revision of legislation. Of that, the KFTC's views and suggestions were reflected in 51 (85%) of those changes in legislation. As such, the KFTC has helped oppose and prevent the introduction and amendment of anti-competition legislation, thereby achieving, in effect, regulatory reform. The percentage of acceptance(85%) indicates that other ministries regard the KFTC's opinions as important.

2) Cabinet Meeting

The KFTC consistently inputs competition perspectives into major policy making procedures such as cabinet meeting as a regular member. After the 4th Revision of the MRFTA in 1994, the KFTC gained full independence as a central administrative body under the Office of the Prime Minister and its status and functions were strengthened and the number of personnel considerably went up (number of staff was 343 as of 1995). Policies, once formulated, are difficult to change. In this regard, the KFTC Chairman can ensure that the views of the competition agency are reflected in the policy-making by attending and expressing his opinions at the Cabinet Meetings. The Cabinet meeting is of great importance, in that it incorporates the different opinions of ministers from the competitive point of view. Based on the authority and capacity provided by law, the KFTC has successfully fulfilled the role of a competition advocate.

B. Ways to Ensure Competition Principles in the Regulatory Reform Procedure

1) KFTC's Experiences as Regulatory Reform Body

Since 1990s, a number of committees relating regulatory reform were newly established. At that time, reform drive lacked specialties in market analysis and techniques for reforming the regulations having possible anti-competitive effects. To ensure competition even after regulations are once set up, the KFTC established an internal organization called 'committee on economic regulatory reform'('97.4-'98), which dedicated to the economic regulations rather than social. The committee successfully performed far-reaching reform against pervasive and deep-seated regulations with the KFTC's own staff members. This was historic in that the meaningful achievements done by the committee firstly prompted the trend of regulatory reform to spread out throughout government agencies.

2) Participating Committee on Regulatory Reform as a Main Member

Afterward, the committee was expanded and elevated under the leadership of Prime Minister, and naturally the KFTC played an important role as a standing commissioner. In its efforts to infuse competition perspectives to other ministries, the KFTC have designed its own guidelines that is to eliminate anti-competitive regulations such as entrance barriers, price control and regulations on business activities.

IV. KFTC's Competition Advocacy Role in the Privatization Procedure

The KFTC also has a keen interest in the privatization of state-owned enterprises (SOEs). Privatizing backbone industries that operate under state monopolies could help produce private monopolies instead of state monopolies. In recognition of this possibility, the KFTC has actively pursued pro-competition policies, including those that promote deregulation.

Privatization of SOEs aims at making the market mechanism work In the public sector and thus to enhance its efficiency of the economy as a whole and ultimately to contribute to the national budget. Creating competitive conditions is the key to enhancing efficiency. Therefore, in order to prevent the transmission of public inefficiency into private monopoly, it is critical to secure market competition.

The current program for privatization and managerial renovation of state owned enterprises(SOEs) in Korea, commenced since 1998, is different from that of the past in that the task of privatization has been executed not by existing but by a newly established organization. The Ministry of Planning and Budget(MPB) played a central role in analyzing the target SOEs in advance and holding hearings. Based on this process, the MPB finalized and announced 'the 1st privatization plan of SOEs' and 'the 2nd privatization and managerial renovation plan' respectively in July 1998 and August 1998. An organization responsible for performing privatization of SOEs, the 'Committee on privatization of SOEs' was created in the MPB. This committee is composed of Minister of MPB as a chairman, vice-chairman of the KFTC, vice-governor of Korea Development Bank and 2 commissioners from the private sector. Since its establishment in September 1998, the committee has been convened eight times so far and dealt with major issues, such as improvement of regulation related to privatization and overseeing the privatizing process. The KFTC has performed competition advocacy role from the stage of drafting the privatization policy. On each ministry's front, a task force team headed by a high-level official is responsible for technical works related to privatization, such as the detailed time schedule and method of selling SOEs, planning strategy, etc..

From the experience on privatization of SOEs, the KFTC has learned that securing transparency in the process of privatization, and the announcement the gradual privatization schedule is important in order to provide predictability to enterprises preparing for privatization. The cases also indicate that it is desirable for competition authority to intervene at an early stage of decision-making on privatization and the importance of structural measure such as vertical separation.

V. Policy Implications and Lessons reaped from Korea's Experience on Competition Advocacy Role in Regulatory Reform

The experience of the KFTC as a competition advocate has several implications.

First, countries that pursue an economic policy focused on industrial policy are likely to breed anti-competitive governmental regulations. This was the case with Korea, where a government-driven growth strategy was adopted and anti-competition regulations established. Though this could be overlooked at the initial stage of development, it eventually distorted market structures and negatively affected economic development. The lesson is that every effort to build a market economy should be undertaken in the initial stage of development. This can be achieved through the introduction of competition policies, with the competition authorities taking on an active competition advocacy role.

Second, it is critical to confer full authority to competition agencies to allow them to serve as effective competition advocates. Because developing countries, in particular, are facing special challenges in the promotion of a free market, the role of such competition advocates is essential to overcoming those challenges.

Third, regulatory reform body should continuously develop its own deregulation logic for securing their regulating power. This procedure cannot be completed in a short span of time, rather it is to be proceeded in a gradual manner with consistency.

Lastly, regulatory reform efforts usually lose its compelling power, because reform efforts are often hindered by political popularity and strong resists from the interest groups. Thus it must be backed up by the political support from general citizen and the top government leader.

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OECD Global Forum on Competition

CONTRIBUTION FROM BIAC

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THE ROLES AND TOOLS OF COMPETITION AUTHORITIES: FUNDAMENTAL CONSIDERATIONS

BIAC PRESENTATION TO THE OECD GLOBAL FORUM ON COMPETITION

I. Introduction

An effective competition law regime is essential to developing economies experiencing rapid and significant deregulation, trade liberalisation and privatisation. When moving from a closed to an open economy, ensuring the continued viability of domestic industries must be carefully balanced with attaining the benefits of foreign investment and increased competition.

Building a competition culture is of the essence. Sufficient awareness of competition principles has to be created and maintained among other government agencies, academia, business, and the general public.

This being said, a key component of any competition regime is an institutional and procedural framework ensuring due regard is given to the fundamental fairness of enforcement actions. Essential internal procedural safeguards available in the jurisdiction concerned should include transparency of the process, and non-discriminatory application of laws, regulations, policies and procedures, without reference to the nationality of the parties concerned.

The dramatic growth in multijurisdictional business activity in the last decade has increased the pressure on domestic competition authorities to work more closely with their foreign counterparts. As business concerns have pursued global trade and investment opportunities on a wider scale, antitrust authorities have been obliged to increase the efforts at co-ordination in order to prevent or manage possible conflicts arising from the application of antitrust laws to international business conduct.

International convergence is a pressing issue for the private sector, most particularly in the area of merger control. With over 60 jurisdictions now having some form of merger regulation in place, parties to international transactions of any consequence are finding themselves subject to merger controls in multiple jurisdictions as a matter of course.

II. The Roles and Tools of Competition Authorities

BIAC submits that the following fundamental considerations should be taken into account in the establishment and operation of competition authorities:

1. Independence of the Authority

Competition authorities in as far as possible, should be functionally independent as to the administration and enforcement of competition law. Related to the independence of the authority is the adequacy of funding for the authority. The amount of resources devoted to competition enforcement should be consistently re-evaluated to account for changes in markets, government action (e.g., deregulation) and other factors.

Advocacy of competition principles by the competition authority towards other government departments and agencies, to the business community, academia, and the general public, is essential.

2. Providing Certainty

Certainty is critical to business planning. Conversely, uncertainty can have a serious chilling effect on potentially pro-competitive business activity. This holds true world-wide.

The possible consequences of uncertainty in enforcement policy may include:

- the inhibition or prevention of innovation and the achievement of potential efficiency gains;
- impeding the creation of new businesses;
- distortions in international investment;
- the prevention of the creation of new standards;
- the inhibition of technology transfers; and
- the distortion of the forms and structures used to carry on business (e.g., uncertainty with respect to the competition law treatment of joint ventures and the possibility of civil or criminal liability may tend to encourage companies to merge rather than create joint ventures.)

3. Transparency

Transparency as to views, policies, and resolution of cases by competition authorities is necessary to promote certainty with respect to the authority's likely approach in a particular case. To that end, the authorities should among other things, issue news releases regarding important decisions, and publish information bulletins, enforcement guidelines, and speeches. This is all the more important regarding competition regimes which involve a "public policy override."

Ensuring the transparency of the investigative and enforcement functions of the authority by the publishing of normative standards is also an effective means of holding accountable the exercise of the decision maker's discretion, while maintaining a flexible system that facilitates negotiated solutions to potential competition law problems.

4. Non-Discrimination

Competition laws should not discriminate between firms on the basis of nationality.

Competition laws, regulations, policies, practices and procedures should not be applied in a discriminatory manner to further the interests of local firms or industries.

5. Due Process

Competition law procedures should operate within a framework that ensures that the fundamental due process rights of the parties concerned are respected, and that appropriate safeguards, including effective appeal procedures, are in place to ensure the enforceability of those rights by the parties concerned.

Mechanisms should be established to ensure decision making is based strictly on facts and legal standards applied objectively in each case.

6. Compliance Oriented Approach

Competition law regimes should be compliance oriented and proceed on the assumption that:

- Most business persons wish to comply with the law;
- A more adversarial or less co-operative approach has a chilling effect on activity which may either be pro-competitive or competitively neutral;
- A more adversarial approach typically results in far greater cost for the authority as well as private parties;
- Effective enforcement can often be achieved through a consultative approach by making it clear that legal proceedings will be commenced when co-operation is not forthcoming or when undertakings are not honoured; and
- Increasing certainty of process and substance is better for all concerned.

A compliance program should include communication, providing confidential advice to business persons contemplating transactions and adopting a flexible approach to resolving cases that warrant intervention.

7. Case Selection Criteria

The authority cannot investigate every potential meritorious case – there are not adequate resources to do so. Authorities should focus on those cases of anti-competitive behaviour which have caused or which have the greatest potential to cause harm to the local economy. Case screening criteria are needed to ensure those cases that merit the devotion of scarce resources receive careful investigation.

Principal screening factors may be the scale and strategic importance of the conduct in question relative to the jurisdiction concerned; whether enforcement action by the authorities would support government policies which encourage economic efficiency; and whether national, international, or major regional participants are involved in the matter. The size of the market is obviously a key factor where the market is large, because the economic impact of even a small price increase or reduction in innovation or service would be very considerable.

8. Information Gathering Tools

It is essential that an enforcement agency be able to conduct its analysis based on facts.

To that end, fact-gathering should be facilitated by providing an incentive for parties (i.e. speed, less expense and certainty) to provide as much information as possible voluntarily.

Apart from formal processes to gather information, authorities should make extensive use of "field interviews," in which it telephones or meets with members of industry to gather their views on issues such as market definition, barriers to entry and effective remaining competition.

Bringing in "outside people" with significant experience in the field or with specialised expertise (such as economists) has proven to be a cost efficient manner of performing through field investigations. It has helped authorities to focus on the most significant practical issues and has also helped them to increase their own industry specific expertise more quickly.

9. Protection of Confidential Information

A significant amount of information submitted to the authority is highly sensitive commercial information which, if improperly disclosed by the authority, could potentially cause substantial harm to the party submitting the information. Thus, the success of an enforcement regime depends to a substantial extent on the degree to which firms feel comfortable that information they give the authority will remain confidential. Given its importance, confidentiality should be statutorily protected.

International Co-operation and Information Sharing

The increasing globalisation of markets brings with it not only benefits, but also an increased risk of anti-competitive conduct that spans borders. In the last few years, the number of cross-border investigations is increasing and information sharing and co-operation are accordingly becoming more important.

There is plenty of room for agencies to benefit from the exchange or "cross-pollination" of ideas with other antitrust organisations around the world with respect to non-confidential information, such as general industry analysis.

Representatives of business internationally have expressed growing concern about the adequacy of the safeguards for confidential information in the world of increasing co-operation. The business community has made a number of specific proposals to the OECD and elsewhere to address these issues in a fair and balanced manner.

10. Competition Challenges in Dynamic Markets

The unique characteristics of the new economy and the increasing importance of knowledge based products, require that competition law authorities careful consider the implications of their actions for future investment, research and innovation. Traditional assumptions underlying competition policy are increasingly being questioned in the new economy. For example, a key aspect of competitive analysis under competition laws around the world is the definition of the size and scope of a relevant market. However, market definition poses substantial challenges as markets are increasingly globalised and new competitors rapidly appearing.

Competition law authorities must keep in mind that overly static efforts to promote competition within the framework defined by existing markets may pre-empt or inhibit innovation and future competition for the development of new markets.

BIAC suggests that antitrust enforcement in developing countries should focus on horizontal and other unambiguous anti-competitive conduct. We advocate similarly that competition authorities should be careful to ensure that the conduct in question is clearly anti-competitive, especially in high technology industries which are undergoing rapid transition. Similarly, competition authorities must be certain that enforcement action is necessary to protect consumers. This is crucial because the cost of interfering too quickly and perhaps too aggressively can inhibit innovation and future competitive growth. Competition law enforcement must try to find the right balance on a case by case basis, as the facts of each case will necessarily differ.

III. Input of the private sector is essential

In our view the participation of the private sector is necessary to the success of any global initiative on competition policy. Private sector input is necessary to ensure that the work done is realistic, potentially effective, balanced, and stands a greater chance of acceptance. While the private sector should not drive the train, it must have a seat on one of the cars of the train. We are grateful for the ticket received today.

The business community represented by BIAC, looks forward to continued discussion on competition issues started today at the OECD Global Forum on Competition.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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OECD Global Forum on Competition

CONTRIBUTION FROM THE WORLD BANK

-- World Bank Group Work on Competition Policy --

This document is submitted by the World Bank as a contribution to the Global Forum on Competition (17 and 18 October 2001).

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WORLD BANK GROUP WORK ON COMPETITION POLICY

Scope of Work

1. The overall objectives of the World Bank Group (WBG) are to foster poverty reduction and sustainable economic development. This is viewed as being best achieved by promoting private sector led economic growth. Properly functioning markets are the most effective vehicle for efficiently organising and deploying society's scarce resources from lower to higher valued uses, and resulting in higher living standards. In this connection competition policy plays a critical role in encouraging and maintaining competitive, flexible and dynamic markets, and business environment in which firms operate.

2. Competition policy, defined broadly includes measures to address private and public restraints which unnecessarily interfere with the effective functioning of markets—in other words, restrictive business practices by firms and public policy interventions such as regulatory and other barriers trade which unduly limit competition. The WBG has sought to foster competition in a number of its programs dealing with such areas as private sector development, structural and economic adjustment loans, trade, competitiveness and investment policy reforms, formulation and implementation of antitrust (antimonopoly) laws, privatisation and private provision of infrastructure services, and related technical assistance. Recently, the Foreign Investment Advisory Service (FIAS) has initiated programs linking FDI to competition policies.

3. In regards to competition (antitrust/antimonopoly) law-policy, the focal point of WBG expertise has primarily resided in the Private Sector Advisory Services Department.[*]

Areas of Assistance

4. The competition law-policy projects have focused primarily on the promotion of "best practice" in the design, implementation, and/or strengthening of competition legislation and institutions. Recognising the different stages of economic development, legal-regulatory systems, institutional capacity, and national economic priorities in various WBG member countries, emphasis has been placed on first, informing policy-makers, the business community, and civic society on the nature, objectives, and importance of competition law-policy through conferences, seminars, and advisory activities stemming from various WBG operations; and focusing advice on the proper application of the core provisions of competition law i.e., price-fixing, market sharing and other forms of collusion; monopolistic (abuse of dominance) and competition advocacy in government economic policy decision-making.

5. While acknowledged as also being important, caution has been generally advised on the administration of provisions dealing with mergers and acquisitions, because the role such transactions play in the efficient restructuring and adjustment of sectors/economy, in attracting foreign direct investment, strategic alliances and joint ventures, technology diffusion, and the need to have sophisticated business-economic expertise.

[*] Competition policy issues relating to the legal and regulatory framework for the private provision of infrastructure services such as electricity, telecommunication, water, sanitation, etc. are dealt by separate responsibility centers/units in the WBG.

6. The WBG involvement in fostering competition law-policy has ranged from participating/organising seminars to assisting in the drafting of laws and guidelines to institutional capacity building through targeted staff training programs, internships and exchange programs. Given that since 1990, more than forty countries have enacted or strengthened existing competition laws, the WBG delivery of various forms of assistance has relied importantly on co-operation with and forming of alliances with competition and aid agencies in various donor countries, different international organisations and other institutions. Most notably, these have been Australia-Competition and Consumer Council, Canada-Competition Bureau, France-Conseil de la Concurrence, Germany-Bundeskartellamt, Japan-Fair Trade Commission, UK-Office of Fair Trading, US-Antitrust Division and Federal Trade Commission, ADB, OECD, UNCTAD, WTO, IADB, OAS, International Bar Association, as well as private and public sector organisations such as industry associations and think-tanks in individual countries.

Technical Assistance Projects (Non-Exhaustive List)—1992—Present.

Argentina (1992, 1996)
Colombia (1992-93,1994-97)
Dominican Republic (2000)
Gabon (1997-98)
Korea (1997-2000)
Indonesia (1998-present)
Morocco (1996-99)
Peru (1996-97)
Thailand (1999-present)
Pakistan (2001)
Ecuador (1993-2001)
Brazil (1994, 1996-1999)
Croatia (1998-present)
Egypt (1997)
Guatemala (1999-present)
Kyrgyz Republic (1998)
Macedonia (1998)
Nicaragua (2000-present)
Philippines (1992-93)
Turkey (1997-98)
Tanzania (2001)
Cameroon (1996-97)
China (1995)
El Salvador (1996-present)
Jordan (1996-98)
India (1996-2000)
Malaysia (1996-98)
Panama (1998-present)
Russia (1992-98, 2001)
Venezuela (2000)
Nigeria (2001)

Conferences and Training Programs (Non-exhaustive list:1992-present)

- International Conferences/Workshops: Argentina (1996), Brazil (1997), Colombia (1992,1994,1998), El Salvador (1997), India (1994,1996), Indonesia (2000), Korea (1999), Nepal (1997), Panama (1998), Russia (1992, 1993, 1995), Thailand (1999), Turkey (1997).
- Training Courses (with World Bank Institute): Vienna (1994,1996), Trest (Czech Republic, 1995) Washington, D.C. (1998), Singapore (2000), Russia (with CIDA and International Law Institute in several major cities, 1992-93, 1995-96).
- Workshop: "Competition Policy: Cross-Country Approaches and Experiences" Washington, DC (2000).
- Workshop: Competition and Competitiveness: Analysis, Policy and Strategy. Washington, DC (1997-2000)

Partnerships

7. The WBG has sponsored/organised/participated in conferences and seminars with ADB, APEC, AUSAID, Bundeskartellamt (Germany), Canadian International Development Agency (CIDA), Confederation of Indian Industry (CII), Conseil de la Concurrence/Dir. Gen. Competition and Consumer Affairs (France), GTZ (Germany) Inter American Development Bank (IADB), International Bar Association, International Chambers of Commerce, Japan Foundation, London Business School (LBS), National Council for Applied Economic Research (NCAER-India), OAS, OECD, UNCTAD, UN (New York) USAID, Vienna Institute, World Trade Organisation (WTO) among others including various NGOs.

OECD Global Forum on Competition

8. The WBG is glad to be invited to participate in the OECD Global Forum on Competition. This forum will be launched in October 2001 and attended by representatives from OECD member countries, 30 non-OECD member countries and international organisations such as UNCTAD, WTO and WBG. The Forum will hopefully provide the WBG with an opportunity to facilitate dialogue among high-level officials, and disseminate research, leading to a better understanding of issues and co-ordination of capacity building activities on the entire range of competition policy issues.

Selected (WBG) Publications and Working Papers

- A Framework for the Design and Implementation of Competition Law and Policy (published jointly with OECD, 1999).
- Glossary of Industrial Organisation Economics and Competition Law (published jointly with OECD, 1996). Available in English, French, Hungarian, Indonesian Bahasa, Thai, Spanish, Russian, Polish languages).
- The Instruments of Competition Policy and their Relevance for Economic Development (Working Paper, # 26, 1995).
- The Basics of Antitrust Policy (1993).
- Synthesis Reports: Competition Policy, Privatisation and Trade Liberalisation (Argentina-1996. Also available in Spanish); Competition Policy and Economic Reform (Brazil-1997. Also available in Spanish and Portuguese); Competition Policy in a Global Economy (India-1997); Competition Policy, Accountability and Economic Adjustment (Thailand-1999-forthcoming); and Competition Policy and Economic Adjustment in Indonesia (Indonesia 2001-forthcoming).
- World Development Report 2002: Building Institutions for Markets (Chapter 7 on Competition).

Web Resources

9. The World Bank Group's Web site for knowledge services in the area of competition: http://rru.worldbank.org. The World Bank Group's is currently discussing a proposed Private Sector Development Strategy (which includes key aspects of competition policy). This can be found at http://rru.worldbank.org/Strategy/index.asp. The WBG' research department has also advanced work on competition policy and law. This can be found at http://www.worldbank.org/research.

Session III.

Instruments of Co-operation

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Dist. : 14-May-1998

COUNCIL

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Council

RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS

(adopted by the Council at its 921st Session on 25 March 1998 [C/M(98)7/PROV])

65460

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports" [C(86)65(Final)]; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];

Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways" [C/MIN(97)10];

Having regard to the Council's long-standing position that closer co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties [C(95)130/FINAL];

Recognising that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

Recognising also that co-operation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

Considering that hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

Considering that effective action against hard core cartels is particularly important from an international perspective -- because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon co-operation -- because they generally operate in secret, and relevant evidence may be located in many different countries;

I. RECOMMENDS as follows to Governments of Member countries:

A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARD CORE CARTELS

1. Member countries should ensure that their competition laws effectively halt and deter hard core cartels. In particular, their laws should provide for:

a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and

b) enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

a) a "hard core cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;

b) the hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorisation.

B. INTERNATIONAL CO-OPERATION AND COMITY IN ENFORCING LAWS PROHIBITING HARD CORE CARTELS

1. Member countries have a common interest in preventing hard core cartels and should co-operate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which co-operation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries' important interests.

2. Co-operation between or among Member countries in dealing with hard core cartels should take into account the following principles:

a) the common interest in preventing hard core cartels generally warrants co-operation to the extent that such co-operation would be consistent with a requested country's laws, regulations, and important interests;

b) to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hard core cartels warrants co-

operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;

c) a Member country may decline to comply with a request for assistance, or limit or condition its co-operation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;

d) Member countries should agree to engage in consultations over issues relating to co-operation.

In order to establish a framework for their co-operation in dealing with hard core cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The co-operation contemplated by this Recommendation is without prejudice to any other co-operation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

II. INSTRUCTS the Competition Law and Policy Committee:

1. to maintain a record of such exclusions and authorisations as are notified to the Organisation pursuant to Paragraph I. A 2b);

2. to serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. to review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve co-operation in the enforcement of competition law prohibitions of hard core cartels.

III. INVITES non-Member countries to associate themselves with this Recommendation and to implement it.

STATEMENT ON THE ASSOCIATION BY NON-MEMBERS WITH THE OECD COUNCIL RECOMMENDATION ON EFFECTIVE ACTION AGAINST HARD CORE CARTELS

1. In Section III of its 1998 Recommendation on Effective Action against Hard Core Cartels [C(98)35/FINAL], the OECD Council "[i]nvites non-member countries to associate themselves with [the] Recommendation and to implement it." As the Committee on Competition Law and Policy (CLP) enters a new and intensified phase of its anti-cartel programme, the Committee wishes to underscore this encouragement to interested non-Members and to facilitate the association process. Therefore, this statement clarifies what association involves and what procedures will be used to consider association requests by non-Members. Additional information may be obtained by contacting the Secretariat in the Competition Law and Policy Division, Directorate for Financial, Fiscal, and Enterprise Affairs, OECD.

2. The Recommendation was issued by the OECD's Council, and it is the Council, in conjunction with the Secretary-General and the Committee for Co-operation with non-Members (CCN), that makes decisions on association requests. The government of a non-Member that wants to make a formal request for association should send its request to the Secretary-General.

3. A letter requesting association with the Cartel Recommendation should be accompanied by a report, written in English or French, that describes the non-Member's substantive legal provisions relating to cartels (as interpreted by its competition authority and courts); the available investigative tools and sanctions, plus its record of using them; and its laws and procedures governing the treatment of confidential information in competition cases. Non-Members are also invited to include a description of any other laws or policies that significantly affect its ability to act against cartels or to co-operate in a cartel investigation. This report will be referred to the Secretariat in the OECD Competition Law and Policy Division, who will determine whether it addresses the required topics. The Secretariat will forward papers that do so to the CLP, and it will inform the government of the non-Member if the report is deficient in this respect. The Secretariat will not undertake to review the report's completeness or accuracy; this is the responsibility of the non-Member government.

4. When the CLP has completed its review of a report forwarded by the Secretariat, it will make its recommendation to the Council, through the CCN. The CLP believes that widespread association with and implementation of the Recommendation would contribute both to halting cartels' multi-billion dollar drain on the global economy and to creating more co-operative relationships among competition authorities around the world. Therefore, the CLP's recommendations will not be based on whether a non-Member currently appears to follow OECD best practices but whether its laws and policies appear to reflect a commitment to move in the direction of effective, efficient, and co-operative enforcement. While the CLP encourages widespread association with the Recommendation and is seeking opportunities for a more active and interactive relationship with non-Members, it should be understood that association with the Recommendation does not entitle a non-Member to participate in CLP meetings or create any other rights or obligations.

ORGANISATION FOR ECONOMIC
CO-OPERATION AND DEVELOPMENT

RESTRICTED

Paris, drafted: 7-Jul-1995
OLIS: >
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C(95)130

Or. Fre.

COUNCIL

DRAFT REVISED RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE

(Note by the Secretary-General)

The draft Revised Council Recommendation was approved by the Committee on Comptetition Law and Policy (CLP) subject to a few minor drafting changes suggested by the United Kingdom Delegation. These changes have been submitted to the CLP for approval by 10 July 1995. In order to allow adequate time for Executive Committee consideration, however, the draft is submitted now in view of its meeting on 19th July 1995.

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1. At its 67th session on 18 and 19 May 1995, the Committee on Competition Law and Policy adopted ad referendum the draft Recommendation of the Council concerning Co-operation between Member countries on Anticompetitive Practices Affecting International Trade [DAFFE/CLP(95)32]. It was agreed that unless further amendments were requested by 30 June 1995 the Committee's decision would then become final and the draft should be forwarded to the Council for adoption.

2. The draft Recommendation is a further revision of the Recommendation of the Council concerning Co-operation between Member countries on Restrictive Business Practices Affecting International Trade, first adopted in 1967 and successively revised in 1973, 1979 and 1986 [C(86)44(Final)]. This new version is aimed at adapting international co-operation in the enforcement of competition rules to recent changes in economic behaviour, notably those related to the globalisation of markets, as has been done in a number of other areas of economic law, including taxation, securities and money laundering.

3. The Gillette - Wilkinson merger in 1990, which was reviewed in several countries, was a catalyst in the Committee on Competition Law and Policy for work on co-operation and information sharing on competition. It was generally felt that co-operation and exchanges of information between Member countries in this case would have simplified the investigations and proceedings which surrounded that merger. This led to a study on merger control procedures[1] and a review of the effectiveness of the 1986 Revised Council Recommendation. Those two projects have converged at this point, resulting in consideration of a new Revised Council Recommendation. The principal amendments to the existing document are described below.

Recommendation

4. The existing Recommendation sets forth principles relating to notification, exchange of information and co-ordination of action (Part I.A.), and consultation and conciliation by Member countries on matters relating to anticompetitive practices (Part I.B.). An Appendix to the Recommendation sets out more specific recommended procedures for implementing the Recommendation. In the proposed revision there are no substantive amendments to the Recommendation itself, only to the Appendix. The most important part of the Recommendation (annexed to this Note), for purposes of this proposed revision, is Part I.A, which recommends three types of co-operation: notification of an investigation or proceeding that could affect important interests of another Member country, co-ordination of investigations or proceedings concurrently conducted by two or more Member countries, and assistance to another Member country by providing relevant information, consistent with legitimate national interests.

Appendix

5. The amendments to the Appendix are limited to the provisions relating to co-operation and co-ordination. There are no changes to the paragraphs relating to consultation and conciliation. Added to paragraph 1 is a reaffirmation of the principle that co-operation pursuant to the Recommendation is subject to the national laws and national interests of Member countries. It also invites Member countries to consider legal measures to give effect to the Recommendation.

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1. Published as "Merger Cases in the Real World. A Study of Merger Control Procedures", OECD, 1994.

6. Paragraphs 3 and 4, which relate to notification of investigations or proceedings, correspond to the first of the three types of co-operation specified in Part I.A. of the Recommendation. New circumstances in which notification would be appropriate include the possibility of remedies that would require or prohibit conduct in the territory of another Member country. A more specific definition is also proposed of the circumstances in which an investigation of a transnational merger by one country affects "important interests" of another country.

7. Paragraph 5, which is entirely new, deals with co-ordination of concurrent investigations and proceedings. It specifies that such co-ordination should be undertaken on a case-by-case basis and should include notification of applicable time periods and schedules, sharing of information consistent with national laws on confidentiality, and co-ordination of negotiation and implementation of remedies. It encourages subjects of concurrent investigations to co-operate with the joint effort where it would be in their interests to do so, including by permitting access by one or more agencies to confidential information when it would be lawful to do so.

8. Paragraphs 6 to 9 deal with assistance in an investigation or proceeding of another country by providing information upon request. Paragraphs 6 and 7 are also entirely new. Paragraph 6 describes various means by which information may be provided by one competition agency to another, including obtaining information by compulsory means. As in the case of concurrent investigations, it is specified that such co-operation should be undertaken on a case-by-case basis, with assistance subject to the applicable national laws of the assisting agency. Paragraph 7 encourages notification by one country of anticompetitive practices occurring in another country that could violate the laws of the notified country.

9. Paragraph 9 provides for consultations regarding cost-sharing when assistance is provided to a foreign agency. Paragraph 10 incorporates principles for protection of confidential information.

10. The Secretary-General considers that the new Revised Recommendation establishes a series of principles that will further international co-operation on the application of competition rules and meet the need to strengthen such co-operation. The principles may be incorporated in specific bilateral or multilateral co-operation agreements, with the Recommendation thereby furthering international co-operation in areas where it is desirable and necessary.

11. The Secretary-General therefore invites the Council to adopt the following draft entry in its Minutes:

THE COUNCIL

a) noted of the Note by the Secretary-General C(95)130;

b) adopted the draft Revised Recommendation concerning co-operation between Member countries on anticompetitive practices affecting international trade appended to Note C(95)130 and agreed to its derestriction.

ANNEX

DRAFT REVISED RECOMMENDATION OF THE COUNCIL

concerning co-operation between Member countries
on anticompetitive practices affecting
international trade

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the fact that international co-operation among OECD countries in the control of anticompetitive practices affecting international trade has long existed, based on successive Recommendations of the Council of 5th October 1967 [C(67)53(Final)], 3rd July 1973 [C(73)99(Final)], 25th September 1979 [C(79)154(Final)] and 21st May 1986 [C(86)44(Final)];

Having regard to the recommendations made in the study of transnational mergers and merger control procedures prepared for the Committee on Competition Law and Policy;

Recognising that anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries;

Recognising that the continued growth in internationalisation of business activities correspondingly increases the likelihood that anticompetitive practices in one country or co-ordinated behaviour of firms located in different countries may adversely affect the interests of Member countries and also increases the number of transnational mergers that are subject to the merger control laws of more than one Member country;

Recognising that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

Recognising the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices;

Recognising that anticompetitive practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

Considering therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of anticompetitive practices;

Considering also that closer co-operation between Member countries is needed to deal effectively with anticompetitive practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anticompetitive practices, as may arise;

Recognising the desirability of setting forth procedures by which the Competition Law and Policy Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to anticompetitive practices affecting international trade;

Considering that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competition laws, they should take into account the present Recommendation and Guiding Principles:

I. RECOMMENDS to Governments of Member countries that insofar as their laws permit:

A. NOTIFICATION, EXCHANGE OF INFORMATION AND CO-ORDINATION OF ACTION

1. When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices;

2. Where two or more Member countries proceed against an anticompetitive practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

3. Through consultations or otherwise, the Member countries should co-operate in developing or applying mutually satisfactory and beneficial measures for dealing with anticompetitive practices in international trade. In this connection, they should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure

would be contrary to significant national interests.

B. CONSULTATION AND CONCILIATION

4. a) A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws may affect its important interests should transmit its views on the matter to or request consultation with the other Member country;

b) Without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding;

5. a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned;

b) Any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;

c) The Member country addressed which agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests;

6. Without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 4 and 5 above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

7. In the event of a satisfactory conclusion to the consultations under paragraphs 4 and 5 above, the requesting country, in agreement with, and in the form accepted by, the Member country or countries addressed, should inform the Competition Law and Policy Committee of the nature of the anticompetitive practices in question and of the settlement reached;

8. In the event that no satisfactory conclusion can be reached, the

Member countries concerned, if they so agree, should consider having recourse to the good offices of the Competition Law and Policy Committee with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

II. RECOMMENDS that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

III. INSTRUCTS the Competition Law and Policy Committee:

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments;

2. To consider the reports submitted by Member countries in accordance with paragraph 7 of Section I above;

3. To consider the requests for conciliation submitted by Member countries in accordance with paragraph 8 of Section I above and to assist, by offering advice or by any other means, in the settlement of the matter between the Member countries concerned;

4. To report to the Council as appropriate on the application of the present Recommendation.

IV. DECIDES that this Recommendation and its Appendix cancel and replace the Recommendation of the Council of 21st May 1986 [C(86)44(Final)].

APPENDIX

GUIDING PRINCIPLES FOR NOTIFICATIONS, EXCHANGES OF INFORMATION, CO-OPERATION IN INVESTIGATIONS AND PROCEEDINGS, CONSULTATIONS AND CONCILIATION OF ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE

Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws. It is recognised that implementation of the recommendations herein is fully subject to the national laws of Member countries, as well as in all cases to the judgement of national authorities that co-operation in a specific matter is consistent with the Member country's national interests. Member countries may wish to consider appropriate legal measures, consistent with their national policies, to give effect to this Recommendation in appropriate cases.

Definitions

2. a) "Investigation or proceeding" means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of a Member country pursuant to the competition laws of that country. Excluded, however, are (i) the review of business conduct or routine filings, in advance of a formal or informal determination that the matter may be anticompetitive, or (ii) research, studies or surveys the objective of which is to examine the general economic situation or general conditions in specific industries.

b) "Merger" means merger, acquisition, joint venture and any other form of business amalgamation that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

Notification

3. The circumstances in which a notification of an investigation or proceeding should be made, as recommended in paragraph I.A.1. of the Recommendation, include:

a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;

b) When it concerns a practice (other than a merger) carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is believed to be required, encouraged or approved by the government or governments of another country or countries;

c) When the investigation or proceeding previously notified may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

d) When it involves remedies that would require or prohibit behaviour or conduct in the territory of another Member country;

e) In the case of an investigation or proceeding involving a merger, and in addition to the circumstances described elsewhere in this paragraph, when a party directly involved in the merger, or an enterprise controlling such a party, is incorporated or organised under the laws of another Member country;

f) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries.

Procedure for notifying

4. a) Under the Recommendation notification ordinarily should be . provided at the first stage in an investigation or proceeding when it becomes evident that notifiable circumstances described in paragraph 3 are present. However, there may be cases where notification at that stage could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and in sufficient time to enable the views of the other Member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.

b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Competition Law and Policy Committee.

c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its national interests. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned, and, if applicable, the need to seek information from the territory of another Member country. In the case of an investigation or proceeding involving a merger, notification should also include:

i) the fact of initiation of an investigation or proceeding;

ii) the fact of termination of the investigation or proceeding, with a description of any remedial action ordered or voluntary steps undertaken by the parties;

iii) a description of the issues of interest to the notifying Member country, such as the relevant markets affected, jurisdictional issues or remedial concerns;

iv) a statement of the time period within which the notifying Member country either must act or is planning to act.

Co-ordination of Investigations

5. The co-ordination of concurrent investigations, as recommended in paragraph I.A.2. of the Recommendation, should be undertaken on a case-by-case basis, where the relevant Member countries agree that it would be in their interests to do so. This co-ordination process shall not, however, affect each Member country's right to take a decision independently based on the investigation. Co-ordination might include any of the following steps, consistent with the national laws of the countries involved:

a) providing notice of applicable time periods and schedules for decision-making;

b) sharing factual and analytical information and material, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10;

c) requesting, in appropriate circumstances, that the subjects of the investigation voluntarily permit the co-operating countries to share some or all of the information in their possession, to the extent permitted by national laws;

d) co-ordinating discussions or negotiations regarding remedial actions, particularly when such remedies could require conduct or behaviour in the territory of more than one Member country;

e) in those Member countries in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or to be made to other countries.

Assistance in an investigation or proceeding of a Member country

6. Co-operation among Member countries by means of supplying information on anticompetitive practices in response to a request from a Member country, as recommended in paragraph I.A.3 of the Recommendation, should be undertaken on a case-by-case basis, where it would be in the interests of the relevant Member countries to do so. Co-operation might include any of the following steps, consistent with the national laws of the countries involved:

a) assisting in obtaining information on a voluntary basis from within the assisting Member's country;

b) providing factual and analytical material from its files, subject to national laws governing confidentiality of information and the principles relating to confidential information set forth in paragraph 10;

c) employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority;

d) providing information in the public domain relating to the relevant conduct or practice. To facilitate the exchange of such information, Member countries should consider collecting and maintaining data about the nature and sources of such public information to which other Member countries could refer.

7. When a Member country learns of an anticompetitive practice occurring in the territory of another Member country that could violate the laws of the latter, the former should consider informing the latter and providing as much information as practicable, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10, consistent with other applicable national laws and its national interests.

8. a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.

b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.

c) Any requests for information located abroad should be framed in terms that are as specific as possible.

9. The provision of assistance or co-operation between Member countries may be subject to consultations regarding the sharing of costs of these activities.

Confidentiality

10. The exchange of information under this Recommendation is subject to the laws of participating Member countries governing the confidentiality of information. A Member country may specify the protection that shall be accorded the information to be provided and any limitations that may apply to the use of such information. The requested Member country would be justified in declining to supply information if the requesting Member country is unable to observe those requests. A receiving Member country should take all reasonable steps to ensure observance of the confidentiality and use limitations specified by the sending Member country, and if a breach of confidentiality or use limitation occurs, should notify the sending Member country of the breach and take appropriate steps to remedy the effects of the breach.

Consultations between Member countries

11. a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultations or to submit its views on the investigation or proceeding.

b) Requests for consultation under paragraphs I.B.4. and I.B.5. of the Recommendation should be made as soon as possible after notification and explanation of the national interests affected should be provided in sufficient detail to enable full consideration to be

given to them.

c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.

d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimise possible conflict.

Conciliation

12. a) If they agree to the use of the Committee's good offices for the purpose of conciliation in accordance with paragraph I.B.8. of the Recommendation, Member countries should inform the Chairman of the Committee and the Secretariat with a view to invoking conciliation.

b) The Secretariat should continue to compile a list of persons willing to act as conciliators.

c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.

d) Any conclusions drawn as a result of the conciliation are not binding on the Member countries concerned and the proceeding of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

Session IV.

Hard Core Cartels

Unclassified **CCNM/GF/COMP/WD(2001)4**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

21-Sep-2001

English text only

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP/WD(2001)4
Unclassified

OECD Global Forum on Competition

QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

-- Note by the Secretariat --

This questionnaire on anti-cartel actions was sent to Invitees in order to focus the responses now included in their respective contributions. It is circulated FOR INFORMATION to serve as a background to the discussion on Hard Core Cartels (session IV) at the Global Forum on Competition to be held on 17-18 October 2001.

JT00113090

English text only

QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

A. General information on cases

1. Please provide a citation and as much of the following information as possible for each case since January 1, 2000 in which your economy challenged a hard core cartel – *i.e.*, an anticompetitive agreement among competitors to fix prices, restrict output, rig bids, or divide or share markets.

(a) Each **respondent's name**, the covered **product or service** and **geographic area**, and the approximate beginning and ending dates of the cartel.

(b) Whether the **evidence of collusion** was direct (written or testimonial) or indirect; the nature of any indirect evidence.

(c) **Amount of commerce**: Estimated monetary value of <u>all</u> sales of the product or service in the geographic area during the cartel (i) annually and (ii) during the cartel. If possible, the same information for all sales by cartel members. For bid-rigging, the magnitude of the contract(s) affected.

(d) **Sanctions:** The monetary value of the fines and other financial sanctions imposed, in total and against each party, under (i) the competition law or (ii) other law. Rationale for the level of competition law sanction, such as a percentage of relevant turnover or of the illegal gain or the loss to victims. A description of other orders, including imprisonment.

2. From all of these cases, please consider when the facts most clearly illustrated the harmfulness of cartels and/or the knowledge of cartel members that the conduct was illegal and/or harmful.

(a) Please supply quotations (preferably) or descriptions of cartel members' oral or written statements concerning the cartel's **actual or intended effect on price**.

(b) Please describe evidence concerning **changes in price or output** when the cartel was formed or when it ceased; **other harmful effects** of the cartel – *e.g.*, on quality, entry, innovation, or efficiency; **changes in firm profits** when the cartel was formed or when it ceased; **excess profits** during the cartel.

(c) Please describe or quote the most **colourful statements** by cartel members revealing their intent, their lack of justification, their awareness of the illegality of their conduct, etc.

(d) Please describe other **dramatic demonstrations** of cartels' harm, such as conduct aimed at particularly sympathetic victims (e.g., old people, children), or otherwise outrageous conduct (e.g., blowing up a factory).

B. General Information on Sanctions

4. Please indicate the applicable **standard of proof and the available sanctions** for competition enforcement in your economy, responding separately for each different type of enforcement (administrative, civil, or criminal) that is used.

5. Please supply or describe any **general schedule or set of principles** used in your economy for calculating fines and other sanctions for (a) economic law violations or crimes in general, (b) competition law violations, and (c) procurement fraud, tax fraud, securities fraud, and other comparable offences. Please provide also the maximum penalties with respect to the above.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

05-Oct-2001

English - Or. English

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP(2001)4
Unclassified

OECD Global Forum on Competition

SUMMARY OF CARTEL CASES DESCRIBED BY INVITEES

(Session IV)

-- Note by the Secretariat --

This note is submitted FOR INFORMATION under session IV of the Forum agenda.

JT00113944

English - Or. English

SUMMARY OF CARTEL CASES DESCRIBED BY INVITEES

1. For the convenience of all participants, this note contains a brief summary of the cartel cases contributed by invitees. It is not anticipated that any of these cases will be formally presented at the Forum, but during the discussion of hard core cartels in Session IV some participants may wish to mention and ask about either their own cases or the cases submitted by others.

Bulgaria

2. Bulgaria provided a summary of three cases and some general information on sanctions

- *Transportation on additional destinations:* fourteen companies that provide intermediate service "transportation on additional destinations" were prosecuted for their participation in price fixing. There are three forms of public transportation in Sofia: fixed route bus service, regular taxi service, and an intermediate service in which the beginning and end points are fixed but the vehicles may vary their routs. The investigation was prompted by announcement provided in a newspaper in January 2000. The companies announced that they would increase prices for the transportation services. The price increase of BGL 0,20 (approximately EUR 0,10) was agreed during a meeting in café. The Commission on Protection of Competition decided, that the conduct of independent companies, aimed at simultaneous and identical raise of the price could be defined as "concerted practice". The companies were fined a total of BGL 92,000 (approximately EUR 47,000).

- *Phone cards:* two companies were prosecuted for their participation in a price fixing conspiracy relating to sales of phone cards. The prices for phone cards set by Bulphone Bulgarian Corporation for Telecommunications and Informatics J.- St. Co. and Radio and Telecommunications Ltd were the same. They were co-ordinated during regular meetings of the companies. Both companies had a common shareholder that acted as an intermediary in price co-ordination. The duration of the agreement was one year. The Commission on Protection of Competition made a prohibiting order and imposed both companies fines of total amount of BGL18,000 (approximately EUR 9,000).

- *Gasification*: two companies were convicted of a conspiracy relating to the provision of services in the area of gasification. There was a contract signed by Overgas Holding J.-St. Co. and Bulgaria 2002 J.-St.Co. Holding. The contract included non-compete clauses for a period of 5 years. In addition, the agreement provided that Overgas Holding J.- St. Co. should pay Bulgaria 2002 J.-St.Co. Holding certain compensation for this restraint. The Commission on Protection of Competition issued a prohibiting order and imposed both companies fines of total amount of BGL 50,000 (approximately EUR 25,500).

- The response to the questionnaire says that according to the Law on the Protection of Competition, the Commission on Protection of Competition can impose a fine on a legal person for violations of the Law to the amount of BGL 5,000,000 (EUR 2,500,000) to BGL 300,000,000 (EUR 150,000,000), and for an individual accordingly to the amount of BGL 1,000,000 (EUR 500,000) to BGL 10,000,000 (EUR 5,000,000).

China

3. China described three cases in its response and some general information on sanctions.

- *Brickyard:* five groups of companies were convicted of participating in a bid rigging conspiracy affecting the operation of a brickyard plant in Zhejiang Province. In July 1999, there was a public tender to the right to operate the plant. The minimum bid was RMB 180,000 (approximately EUR 23,400). The highest bid would win a tender. In order to force down the price, representatives of the groups met and determined the bid winner and the winning price. They also decided that the bid winner would pay the other four groups a total of RMB 200,000 (approximately EUR 26,000) as compensation. The agreed winner won the bid with RMB 180,088 (approximately EUR 23,411). The municipal administration for industry and commerce in Zhejiang Province made a decision, declaring that the bid was invalid. In addition, the respondents were fined of RMB 50,000 (approximately EUR 6,500) each.

- *School building:* ten construction companies were prosecuted for bid rigging on contract for the construction of a school building. In 1998, the school signed a contract with No.2 Construction Company without announcement of a tender. After the construction was started, it was decided to revise the original design plan and to announce a tender. Ten construction companies including No.2 Construction Company agreed that No.2 Construction Company would get the contract in exchange for payments to the other companies. They also assigned one of the companies to calculate the bidding prices of all candidates. No.2 Construction Company won the bid at a higher price than before. The administration for industry and commerce issued a decision, declaring that the bid was invalid. The illegal gains of RMB 9,000 (approximately EUR 1,170) of No.2 Construction Company were confiscated.

- *Engineering construction*: two companies were prosecuted by the municipal administration for industry and commerce in Jiangxi Province for colluding on their bids in response to public tenders. On October 9, 1998, two construction companies agreed in exchange for a management fee that one of the companies would act as agent of the other company in exercising its operating rights in the construction engineering businesses. Thereafter, the "agent" participated in bidding for construction projects in the name of the two companies at the same time and often won the bids. This case was ongoing at the time of the response to the questionnaire.

- The Law for Countering Unfair Competition of 1993 provides that the maximum amount of penalty for the offences is RMB 200,000 (approximately EUR 26,000). Penalties are calculated on the basis of illegal gains.

Estonia

4. Estonia submitted a description of three cases and general information on sanctions and general information on sanctions. It made no submission regarding sanctions. Fines in Estonia are imposed by courts.

- *Milk products*: there was a meeting of four leading milk processors and ten wholesalers of milk products in Estonia held in Rakvere city on 28 January 2000. The purpose of the meeting was to agree on reduction of sell-off and purchasing prices of milk products. Although no agreement was concluded during the meeting, exchange of information about

sell-off prices of milk products and deduction rates influenced behaviour of the processors and the wholesalers to act similarly with their competitors. The exchange of the information is prohibited by the Competition Act when it distorts competition. The Competition Board issued a prohibiting order.

- *Taxi services:* three companies were prosecuted for participating in a price fixing conspiracy involving the provision of taxi services in the city of Parnu. The investigation was prompted by announcements provided in newspapers. In 1999, the companies set the uniform discounted tariff of 5 EEK/km (approximately 0,32EUR/km) to customers, the owners of loyal customer cards of the companies. The share of the companies involved comprised over 40% of the taxi service market. After the evaluation, the Competition Board ordered the three companies to cease the practice and submitted the case to the court. The District Court imposed fines of amount of nearly EEK 10,000 (EUR 639) on each of the respondents.

- *Road transport:* The Association of Estonian International Road Carriers was prosecuted for participating in a price fixing involving the provision of international transport services. In October 1999, the Association established a special Commission which compiled a uniform pricing policy (minimum price levels) for road transport services and proposed road carriers to apply them. The Commission also proposed to exclude from the Association the carriers who did not comply with the price rates calculated by the Commission. The proposals were published both in the newspaper of the Association and in the main business daily newspaper. The Competition Board issued a proscriptive order, and the Association ceased its practices and made appropriate announcements in the newspapers. No sanctions were applied in this case.

Indonesia

5. Indonesia has had only one cartel case. It described that case in its questionnaire response and also submitted a copy of the complete decision of the Business Competition Supervisory Commission. It also submitted general information on sanctions.

- *Caltex:* four companies were prosecuted for participation in bid rigging involving the supply of pipe and pipe processing services. Three pipe processors were found to have exchanged their prices with each other at a meeting in a hotel the evening before the bids were opened. Caltex, an oil company, which announced a tender, was held responsible for failing to ensure fair bidding. The bid rigging conspiracy was formed in May 2000. Material evidence was contained in statements of a complainant, as well as in the testimony of witnesses from the respondents. As Caltex was the first case ever brought by the Commission, no fines or other sanctions were imposed. Instead, the Commission ordered that the contract between Caltex and the apparent lowest bidder be dissolved and that entire tender process be redone.

- According to Articles 47 and 48 of the Law Number 5 of 1999, the Commission for the Supervision of Business Competition can impose civil fines up to Rupiah 25 billion (EUR 2,875,000) for violations of the law or criminal fines up to Rupiah 100 billion (EUR 11,500,000), and prison terms of up to six months.

Kenya

6. Kenya made no submission regarding cartel cases.

Latvia

7. Latvia described two cartel cases in its questionnaire response and general information on sanctions.

- *Aviation:* Two companies were prosecuted for their participation in a conspiracy relating to international air transportation. On August 1, 1998 the Latvian company "Airbaltic" and the Russian company "Transaero" concluded an agreement on co-operation in the organisation of passenger flights between Riga and Moscow. The agreement provided that no party to the agreement should operate regular flights between Latvia and Russia, except for the flights provided in the agreement. In addition, the agreement provided that Airbaltic should pay certain payments on condition that Transaero agrees not to compete with Airbaltic by offering regular transportation to/from Latvia and inside Latvia. The term of the agreement was 10 years, but it was in force for less than one year. The Competition Council was empowered to impose fines only on "Airbaltic". The amount of the fine was of 0,7% of the respondent's total turnover of 1998.

- *Courier post:* Two companies were prosecuted for participating in a conspiracy involving the provision of international courier post services. On September 23, 1999, the state-owned company "Latvijas Pasts" and DHL International Limited concluded an agreement containing restrictive terms that potentially threatened competition. After the investigation was started, the parties terminated the violation by excluding the competition restrictive clauses. As there was no practical effect on competition ascertained, no sanctions were applied in this case.

- Under the Latvian competition law, the Competition Council may impose a fine of up to 10% of the respondent's annual turnover.

Peru

8. Peru submitted a description of two cartels in its report and also submitted an extensive description of its "chicken cartel" case. It also provided information on cartels in its questionnaire response and general information on sanctions.

- *Building and construction:* three companies were convicted of participating in bid rigging on a contract for the construction of a secondary electricity net in Puerto Maldonado City. The tender was called by an electric power distribution company Electro Sur Este in November 1997. Later, Electro Sur Este accused the building and construction companies of bid rigging. The claim was based on evidence from the documents presented by the three bidders. The documents contained the same redaction and the same format, they also presented the same orthographic errors, the same time of construction and almost the same price bid. These facts were investigated and confirmed by the Technical Secretariat. In addition, the Free Competition Commission considered some indirect evidence in this case. After the evaluation, the Commission ordered the three companies to cease the practice and imposed fines of amount of nearly EUR 1,800 on each of the respondents.

- *Taxi Tours:* A number of companies were prosecuted for their participation in a price fixing involving transportation services in the city Lima. In December 1999, the companies which were members of an association informed local authorities of their agreement to increase prices. The local authorities accused the companies of competition restricting practices and submitted direct evidences to the competition authority in a form of copies of the documents

containing the communication and the decision of the Union to increase the price of tickets. As a result of the investigation, it was proven that the companies participated in the agreement of fixing jointly the price of transportation service. The outcome of the case was a signed document in which the companies expressed their commitment to cease the restrictive practices. Only one company, which did not sign the document, was sanctioned with a fine of amount of about EUR 900.

- If the violation is graded as very serious, the Commission on Free Competition may impose a fine exceeding 1,000 UITs (approximately EUR 900,000) provided that it does not exceed 10% of the respondent's gross sales or income.

Romania

9. Romania submitted a description of one cartel case in its report. It also provided information on one more cartel in its questionnaire response, but no general information on sanctions.

- *Mineral water*: National Company of Mineral Waters (NCMW) and members of the Employers' Association "APENIM" were convicted of participating in a price fixing conspiracy relating to the bottling of mineral water in Romania. The price of the extracted mineral water was set through negotiations between NCMW and the companies within "APENIM" in 1997. The agreement indirectly affected the decision-making independence of the other companies, non-members of "APENIM". The Competition Council imposed fines on NCMW and on the bottling undertakings involved in the anti-competitive practice.

- *Drugs:* Members of Pharmacists Association were convicted of participating in a conspiracy relating to pharmaceutical distribution in Romania. In 1997, the pharmacists concluded an agreement aimed at sharing the estimated amount of all sales in the drug distribution market (approximately EUR 430 million per year) and not allowing other competitors enter the market. The restrictive agreement coincided with the date of setting up the association and existed until December 2000. The Pharmacists Association together with the Ministry of Health also established a number of barriers on market entrance. Since the price of drugs is regulated in Romania, the effects on prices and selling amount could not be estimated in this case. The fine imposed according to the Competition Law has been calculated as a percentage of profit of the Pharmacists Association.

Slovenia

10. Slovenia's submission described two cartel cases and general information on sanctions.

- *Electric energy: i*n 2000, five major producers of electric energy were convicted of participating in a price fixing conspiracy relating to the provision of electric energy in Slovenia. The conspirators agreed on a joint offer to eligible customers that specified the terms of sales including a set price. One of the conspirators was chosen as a co-ordinator of actions among the companies. There was direct evidence of the collusion. The cartel was prohibited by the Office.

- *Cultural events:* two companies were convicted of their participation in conspiracy relating to the organisation of cultural events in Slovenia. In November 2000, the companies concluded an agreement on mutual co-operation, which aimed at preventing competition in the national market. The agreement contained clauses not to compete with each other, and not to allow

other participants to enter the market. The Office issued the decision, declaring that the agreement was invalid and asked the court to impose fines.

- According to Articles 52 of Prevention of the Restriction of Competition Act, a monetary fine of SIT 10,000,000 (EUR 45,000) to SIT 30,000,000 (EUR 135,000) can be imposed on a legal person, and on an individual, SIT 3,000,000 (EUR 13,500) to SIT 15,000,000 (EUR 67,500).

South Africa

11. South Africa provided one case in its questionnaire response and general information on sanctions.

- *Description of agreement*: there was a complaint of farmers of citrus fruits about a joint conduct of members of the Association relating to the purchase, packaging and sale of citrus fruits. In 1999, the Association enacted a decision fixing of trading conditions. This case was ongoing at the time of the response to the questionnaire.
- The Competition Tribunal can impose a fine of up to 10% of the firm's annual turnover.

Chinese Taipei

12. Chinese Taipei submitted a description of three cartel cases in its report. It also provided information on cartels in its questionnaire response and general information on sanctions.

- *Wheat*: the Flour Association was convicted of organising a buyers' cartel involving wheat products. In 1997 and 1998, the Flour Association instituted a total quantity control and quota system among 32 flour producers, by means of, among other, "purchase allocation meetings". It improperly intervened in each member's inventory management and obstructed fair competition among enterprises. The Fair Trade Commission issued the decision to cease these practices, and imposed the Flour Association a fine of NT$20 million (EUR 620,000).

- *Mobile cranes:* six companies were prosecuted for bid rigging on a contract for the procurement of truck-mounted mobile cranes from Taiwan Power Company in 1998. They knowingly, and through mutual communications, apportioned the number, suppliers, and amounts of the winning bids before the bid opening. These acts violated Article 14 of the Fair Trade Law, which prohibits concerted acts. The Commission ordered them to cease the concerted practices. The case also included another violation of the Law committed by Taiwan Power Company that improperly restricted the criteria to bid on its contract. The company was ordered to cease its actions.

- *Liquefied Petroleum Gas*: twenty seven companies were convicted of participating in a price fixing conspiracy relating to delivery of liquefied petroleum gas (LPG) in southern Taiwan. The companies involved in this case were all at the "filling station" level within the vertical distribution structure of the household LPG market, and were competitors in their respective Kaohsiung-Pintung and Tainan markets. The alleged concerted practices were operated through continued meetings to set fees and agreements to divide customers, which had the effect of restraining trading counterparts, prices and other business activities. The 19 filling stations involved in this case accounted for 97% of the total volume sold in the Kaohsiung-

Pintung area, and the eight stations in the Tainan area accounted for over 80% of the volume sold there. The conduct of the operators involved had violated Article 14 of the Fair Trade Law. The respondents were fined amounts ranging from NT$1 million to 15 million (EUR 31,000 to 465,000), and totaling NT$133 million (EUR 4,123,000).

- The maximum penalty for violating the Fair Trade Law is up to NT$100 million (EUR 3,100,000) and/or up to three years imprisonment.

Thailand

13. Thailand made no submission on cartel cases and general information on sanctions.

- Penalties for violations of the Competition Act include jail terms of between one to three years and/or fines ranging from two to six million baht (EUR 48,000 to EUR 144,000). The penalties may be applied to a legal person, and to an individual.

Ukraine

14. Ukraine described two agreements in its response and general information on sanctions.

- *Electronic cash-machines:* three companies were prosecuted for participating in a price fixing conspiracy involving the provision of technical services for electronic cash-machines in the city of Donetsk region. In June 1999, two companies forced their competitor, whose prices were comparatively lower, not to compete on prices. At their meeting the respondents agreed on a so-called "sole" tariff for the services. The effect of the agreement was to raise the price by 5-10 hryvnias (approximately EUR 1,0-2,0) per unit. The respondents in this case were fined. When the agreement broke down, prices fell again.

- *Kaolin:* in October 2000, two competing destributors, "Prommasheksport" and "Gepard", concluded a contract specifying amounts of sales of the product. This agreement was found unlawful. It apparently came to light during a later review of a proposed acquisition by "Prommasheksport" of a firm in which "Gepard" had an interest.

15. Ukraine made no submission regarding sanctions.

Zambia

16. Zambia described two cartel agreements in its report. It also provided information on cartels in its questionnaire response.

- *Poultry:* two companies were convicted of their participation in a conspiracy involving the poultry sector. Hybrid Poultry Farm (HPF), the dominant producer of day old chicks (market share 60%) in Zambia, and Galaunia Holdings Limited (GH), the largest buyer in poultry sector, made the agreements on sales and purchase, which included provisions foreclosing competition both in the day old chicks, table birds (broiler) and frozen chicken. The agreements on sale of Mariandale Farm, which specialised in the raising of day old chicks into table birds, and the poultry processing factory to GH, included exclusive dealing clauses and conditions, including a requirement that GH could not begin to sell day old chicks in

competition with HPF. The Board of Commissioners made a decision, declaring that the agreements were invalid.

- *Oil*: nine oil-marketing companies were prosecuted for participating in a price fixing conspiracy involving the provision of refined petroleum products. The companies acted collectively in price adjustments since 1997. They selected one company to apply for a price adjustment to the Sector Regulator who sets a price cap. They held regular meetings where exchanges of information regarding sales volumes and prices take place. The cartel leaders also forced other companies to comply with standard behaviour on prices. The Zambia Competition Commission has prepared documentation, received minutes of the meetings, the nature of shared information with a view to lodge the case with High Court of Zambia for prosecution.
- In Zambia sanctions are applicable to all kinds of agreements. Administrative sanctions involve ordering the termination/revocation of an agreement, civil sanctions involve payment of 100,000 penalty units, which are equivalent ZK 18 million (approximately EUR 5,220). Criminal nature of cartels may lead to a penalty of ZK 18 million (EUR 5,220) and/or an imprisonment of up to 5 years in jail.

Non classifié **CCNM/GF/COMP/WD(2001)14**

Organisation de Coopération et de Développement Economiques
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NOTE DE LA SUISSE

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LES CARTELS RIGIDES EN DROIT SUISSE DE LA CONCURRENCE

I Bases légales

a) législation actuelle

La loi fédérale sur les cartels et autres restrictions à la concurrence du 6 octobre 1995 (ci-après LCart; RS 251) est entrée en vigueur le 1er juillet 1996. La lutte contre les cartels dits "rigides" (ou "hard core cartels") de même que contre les autres types d'accords horizontaux et verticaux en matière de concurrence est, au côté de la lutte contre les abus de positions dominantes et du contrôle des concentrations, bien entendu l'un des objectifs prioritaires de cette loi.[1]

Le législateur a ainsi prévu une **présomption de suppression de la concurrence** efficace pour les accords horizontaux en matière de prix, de quantités et de répartition des marchés ou des partenaires commerciaux.[2] Cette présomption peut être réfutée si l'on constate que la concurrence interne et/ou externe subsiste malgré l'existence d'un tel accord. Si la présomption de suppression de la concurrence efficace peut être levée, il convient ensuite d'examiner concrètement si la concurrence est affectée de manière notable.[3]

Le **caractère notable d'un accord** s'apprécie en fonction de critères aussi bien qualitatifs que quantitatifs.[4]

Le **critère qualitatif** se réfère à l'importance du paramètre concurrentiel objet de l'accord. Cette importance diffère bien entendu d'un marché à l'autre. A titre d'exemple, la portée de la recherche et du développement sur le marché pharmaceutique ou dans les branches de haute technologie sera déterminante, alors qu'elle sera de moindre importance sur le marché des services ou d'autres marchés de production. En général, les paramètres prix, quantité (de biens ou de services à produire, à acheter ou à fournir) et le choix des marchés (territoires ou en fonction des partenaires commerciaux) énumérés à l'art. 5 al. 3 LCart sont les paramètres essentiels de la concurrence sur presque tous les marchés.

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1 Art. 4 al. 1: "Par accord en matière de concurrence, on entend les conventions avec ou sans force obligatoire ainsi que les pratiques concertées d'entreprises occupant des échelons du marché identiques ou différents, dans la mesure où elles visent ou entraînent une restriction à la concurrence."

2 Art. 5 al. 3: "Sont présumés entraîner la suppression d'une concurrence efficace dans la mesure où ils réunissent des entreprises effectivement ou potentiellement concurrentes, les accords:

a. qui fixent directement ou indirectement des prix;

b. qui restreignent des quantités de biens ou de services à produire, à acheter ou à fournir;

c. qui opèrent une répartition géographique des marchés ou une répartition en fonction des partenaires commerciaux."

3 Art. 5 al. 1: "Les accords qui affectent de manière notable la concurrence sur le marché de certains biens ou services et qui ne sont pas justifiés par des motifs d'efficacité économique, ainsi que tous ceux qui conduisent à la suppression d'une concurrence efficace, sont illicites."

4 DPC 2000/2, p. 177ss; 2000/3, p.320ss; ZÄCH, Schweizeriches Kartellrecht, Berne 1999, p. 157ss et renvois.

Le **critère quantitatif** se réfère quant à lui à la puissance sur le marché des entreprises parties à l'accord. La structure du marché déterminant est examinée sous les trois aspects suivants, relativement:

- à la concurrence actuelle;
- à la concurrence potentielle;
- aux partenaires potentiels des entreprises parties à l'accord.

Dès lors qu'un accord affecte de manière notable la concurrence sur un marché déterminant, la Commission de la concurrence (ci-après Comco) examine s'il peut être justifié pour des **motifs d'efficacité économique**. Cependant, la justification ne s'applique qu'à trois conditions cumulatives:

- il doit s'agir d'un des cas énoncés de manière exhaustive par la loi; [5]
- l'accord doit être nécessaire, et non seulement utile, pour atteindre les objectifs d'efficacité économique (*ultima ratio*);
- l'accord ne doit en aucun cas entraîner une suppression de la concurrence efficace.

b) Révision en cours

Un projet de révision de la loi fédérale sur les cartels est en cours. S'il est approuvé par le Parlement, la nouvelle loi devrait entrer en vigueur le 1er juillet 2003. Cette révision a pour *objectif principal* d'introduire la possibilité de sanctionner directement les entreprises, tout en veillant à respecter l'article constitutionnel en la matière. Celui-ci repose en effet sur le principe de l'abus et n'autorise pas des interdictions *per se* de cartels.

Jusqu'à présent, les autorités de la concurrence ne pouvaient que sanctionner la violation d'une décision entrée en force et interdisant à une entreprise de poursuivre ses pratiques illicites. Le projet prévoit la possibilité de sanctionner les entreprises dès la constatation de l'illicéité de leur comportement (sanctions directes). La révision n'a pas pour objet d'introduire un système général de sanctions. Cela concerne directement et uniquement les cartels rigides, puisque des sanctions directes ne seront possibles que contre ce type bien précis d'accords horizontaux, ainsi que les cas d'abus de position dominante selon l'art. 7 LCart. L'effet préventif de la LCart est donc considérablement accru pour ces types de restrictions à la concurrence, considérés comme constituant des restrictions à la concurrence particulièrement graves. Dans tous les autres cas, la LCart s'en tient au système existant qui consiste à sanctionner les comportements récidivistes de la part des entreprises.

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5 Art. 5 al. 2: " Un accord est réputé justifié par des motifs d'efficacité économique:

a. lorsqu'il est nécessaire pour réduire les coûts de production ou de distribution, pour améliorer des produits ou des procédés de fabrication, pour promouvoir la recherche ou la diffusion de connaissances techniques ou professionnelles, ou pour exploiter plus rationnellement des ressources; et

b. lorsque cet accord ne permettra en aucune façon aux entreprises concernées de supprimer une concurrence efficace."

Le projet prévoit que le montant de l'amende se calcule d'après le chiffre d'affaires réalisé en Suisse au cours des trois derniers exercices précédant le comportement illicite et peut atteindre jusqu'à 10% de ce chiffre d'affaires. La Commission de la concurrence est compétente en la matière. La sévérité de la sanction dépend de la durée de la restriction et de son importance. La Comco tiendra également compte du gain présumé qu'en a retiré l'entreprise. Ce cadre de sanctions permet d'obtenir un effet dissuasif même dans les cas les plus graves, tout en laissant une certaine marge de manœuvre aux autorités qui peuvent, dans les cas de moindre gravité, réclamer une amende symbolique.

Parallèlement à l'introduction des sanctions directes, le projet de loi prévoit de donner aux entreprises une possibilité d'échapper aux sanctions directes. En effet, afin qu'elles n'aient pas à supporter les risques liés à une mauvaise évaluation de leurs pratiques, les entreprises peuvent notifier à l'avance à la Comco les pratiques qui pourraient se révéler illicites. Une entreprise qui prend l'initiative de "se dénoncer" ne pourra pas être sanctionnée pour pratique illicite.

Finalement, le projet de loi crée des incitations pour les membres des cartels à dénoncer ceux-ci. La Comco pourra, grâce au programme de clémence, renoncer partiellement ou complètement à prendre des sanctions directes contre une entreprise qui a contribué à découvrir le cartel dont elle fait partie. Cette solution devrait faciliter ses enquêtes et mettre un terme à la solidarité entre membres de cartels, méthode qui a fait ses preuves à l'étranger. La possibilité d'une coopération a posteriori de l'entreprise ne saurait être confondue avec son droit de notifier à l'avance une pratique illicite. Ce dernier droit est un facteur de sécurité juridique pour l'entreprise alors que l'abandon possible d'une sanction dans l'hypothèse d'une coopération a posteriori vise simplement à améliorer les résultats d'enquêtes.

2. Jurisprudence

Depuis le 1er janvier 2000, les autorités suisses de la concurrence ont traité les cas suivants de cartels rigides:

Enquête sur le marché des cours de conduite *AFEC* (DPC 2000/2, p.167ss): Le 8 mai 2000, la Comco a interdit aux moniteurs de l'Association des écoles de circulation du canton de Fribourg (AFEC) de s'entendre sur les tarifs pour les cours pratiques auto, moto et camion ainsi que pour les cours de sensibilisation au trafic. Pour la Comco, les recommandations de prix constituent des cartels présumés illicites lorsqu'elles sont suivies par les entreprises auxquelles elles sont destinées. Peu importe que ces recommandations ne soient pas obligatoires. Dans le cas d'espèce, l'enquête a établi que les accords de prix en question étaient suivis par les moniteurs auto-école, ce qui a eu pour effet d'affecter notablement, voire de supprimer la concurrence efficace entre les moniteurs de conduite dans le canton de Fribourg. Les résultats de cette enquête ont confirmé les indices de restrictions illicites de la concurrence que le secrétariat avait mis en évidence suite à plusieurs enquêtes préalables menées au printemps 1999 dans plusieurs cantons suisses. Le recours interjeté par l'AFEC a été récemment rejeté par la Commission de recours qui a donné raison en tous points à la Comco (DPC, 2001/1 p.200 ss).

Enquête sur le prix des boissons (DPC 2000/1 p.25 ss) : Dans cette affaire, la Comco a examiné des recommandations de prix pour certaines boissons servies dans la restauration. Ces recommandations ont été émises par cinq associations professionnelles de Gastrosuisse à l'attention de leurs membres. Après avoir mené une enquête préalable qui a confirmé l'existence d'indices pour un accord illicite sur les prix, le secrétariat de la Commission a conclu un "accord à l'amiable" dans lequel les parties concernées ont déclaré que chaque restaurateur pouvait définir ses prix librement; elles se sont également engagées à ne plus émettre de telles recommandations. Cet accord a été approuvé par la Comco.

Enquête sur le marché des vitamines (DPC 2000/2 p. 186 ss): Par décision du 17 avril 2000, la Comco a déclaré illicites les accords passés entre les membres du cartel mondial des vitamines qui avaient déployé des effets en Suisse depuis 1990 jusqu'en 1999. L'absence de toute possibilité de sanctions semblables à celles infligées par d'autres autorités nationales a lancé un débat politique sur un possible renforcement du régime des sanctions prévues par la LCart.

Enquête " asphaltage des routes " (DPC 2000/4 p. 588 ss): Par décision du 4 décembre 2000, la Comco a déclaré illicite un accord impliquant trois sociétés suisses et deux entreprises allemandes actives dans l'asphaltage. En effet, l'accord en question portait sur les prix, les quantités et la répartition territoriale du marché. Il supprimait depuis 1996 la concurrence efficace sur le marché de l'asphaltage. Avant l'émergence de ce cartel, les entreprises suisses étaient en concurrence avec les entreprises allemandes qui offraient leurs prestations à des prix nettement plus avantageux. Selon l'accord incriminé, les sociétés allemandes s'abstenaient de concurrencer les entreprises suisses, en échange de quoi ces dernières s'engageaient à leur acheter annuellement certaines quantités de bitume. Par la suite, les prix des produits allemands ont fortement augmenté, ce qui permettait aux entreprises suisses de maintenir artificiellement un niveau de prix plus élevé. D'autres entreprises, non membres du cartel, ont également profité de ce niveau de prix surélevé.

Enquête sur les prix des quotidiens au Tessin[6] (DPC 2000/1 p. 16 ss): Par décision du 7 février 2000, la Commission de la concurrence (Comco) a approuvé un accord à l'amiable avec les sociétés éditrices des trois quotidiens tessinois et l'Association tessinoise d'éditeurs de journaux (ATEG). Par cet accord, les trois sociétés éditrices de ces quotidiens se sont engagées à renoncer à l'avenir à tout accord sur les prix des abonnements et de vente aux kiosques de leurs journaux. Par ailleurs, les sociétés éditrices et l'ATEG ont renoncé à la publication commune et simultanée de leurs prix. Chaque quotidien s'engage ainsi à communiquer ses prix pour l'année suivante de manière individuelle. Cette décision a mis fin à un comportement qui aurait pu être contraire à la loi sur les cartels. En effet, ces prix étaient égaux depuis des années pour les trois journaux et étaient communiqués au public simultanément, pouvant laisser présumé qu'il s'agissait d'un accord sur les prix.

Enquête sur le marché de la distribution des médicaments - *Sanphar* (DPC 2000/3 p. 320 ss): *Il s'agit là d'un des plus importants cartels rigides interdits en Suisse ces dernières années. L'accord Sanphar prévoyait en effet tout un système fixant les marges aux différents échelons du processus de distribution des médicaments. Ce cas est présenté plus en détail ci-après:*

Le marché suisse de la distribution de médicaments est extrêmement réglementé par des dispositions de droit public. Les faibles possibilités de libre concurrence restant étaient pratiquement annihilées par la réglementation privée établie au sein de l'association Sanphar. Sanphar regroupait la plupart des producteurs, distributeurs et importateurs de médicaments, de même que les associations de grossistes et de détaillants. L'ancienne Commission des cartels s'était déjà penchée sur ce cas dès 1995. La Comco a repris le flambeau et ouvert une enquête en avril 1998. Le but de cette procédure était de déterminer si la fixation des marges de prix et des rabais pouvant être accordés de même que les conditions imposées aux grossistes par Sanphar, constituaient des restrictions illicites à la concurrence au sens de l'article 5 de la Loi sur les cartels.

L'enquête a été ouverte à l'encontre des producteurs de produits pharmaceutiques, des grossistes, des pharmaciens, des droguistes et des médecins qui vendent des produits pharmaceutiques.

En juin 2000, la Comco a constaté l'illicéité de "l'ordre des marges" Sanphar en la matière[7]. Sanphar s'est vue interdire à l'avenir toute communication concernant ces éléments à ses membres.

6 Le Tessin est l'un des 26 cantons suisses.

7 Décision de la Commission de la concurrence du 7 juin 2000, DPC 2000/3 p. 320ss.

L'association a par ailleurs été dissoute après publication de la décision. Un recours est pendant devant la Commission de recours pour les questions de concurrence.

Dans le cas présent, plusieurs pratiques ont dû être analysées: fixation des marges de prix et rabais au niveau des producteurs, des grossistes et des commerçants de la branche, de même que les conditions imposées aux grossistes. Il a été constaté que les dispositions réglementaires de Sanphar y relatives constituaient bien des accords en matière de concurrence au sens de la loi.

Accord au niveau des producteurs

Les producteurs et importateurs ont convenu qu'il n'était possible de s'écarter des prix « ex-factory » en accordant des rabais aux grossistes que dans une marge de +/- 2%, et cela sous peine de sanctions. La Comco a constaté que cet accord conduisait à une suppression de la concurrence efficace sur le marché suisse de la distribution des médicaments aux grossistes.

La LCart présume que les cartels dits „rigides", c'est-à-dire notamment *les accords entre entreprises concurrentes qui fixent directement ou indirectement les prix* (art. 5 al. 3 litt. a LCart), sont illicites. En l'occurrence, il s'agit d'un accord fixant des ordres de marge et de rabais. Selon le Message du Conseil fédéral relatif à la LCart, les ententes sur les rabais tombent également sous le coup de la présomption de l'article 5 alinéa 3 lettre a LCart[8]. Cette présomption peut cependant être renversée si la concurrence externe *ou* interne subsiste malgré l'accord.

La concurrence externe ne peut venir de l'étranger puisque l'importation parallèle de médicaments est interdite par l'ordre juridique suisse. Il n'existe pas non plus de concurrence externe en Suisse, puisque les quelques producteurs non-membres de Sanphar appliquent pour la plupart les mêmes conditions.

Il n'existe pas non plus de concurrence interne, puisque tous les membres de Sanphar se tiennent aux conditions établies, faute de quoi ils se voient amendés.

La présomption n'ayant pas pu être renversée, la Comco a conclu que les ordres de marges et de rabais de Sanphar supprimaient la concurrence efficace entre producteurs/importateurs. Elle est subsidiairement encore parvenue à la constatation que même si l'on ne devait pas conclure à une suppression totale de la concurrence, celle-ci était néanmoins restreinte de manière notable - sans justification pour des motifs d'efficacité économique - et donc illicite.

Accord au niveau des grossistes

Les grossistes n'ont pas le droit d'octroyer à leurs clients des rabais dépassant la marge des grossistes Sanphar, ce qui a pour effet principal de les empêcher de faire des actions spéciales en baissant les prix pour réagir à l'état de la demande.

La Comco a apprécié la notabilité de l'affectation de la concurrence en fonction de critères qualitatifs et quantitatifs[9]:

8 Feuille fédérale 1995 I 562.

9 R. ZÄCH, Schweizerisches Kartellrecht, Berne 1999, p. 157ss et renvois; Décision „AFEC", DPC 2000/2 177.

Affectation qualitative: Le fait que les grossistes ne puissent pas mener de campagnes d'action en accordant des rabais supplémentaires pour gagner des parts de marché affecte directement le prix, ce qui a permis à la Comco de dire que cela restreignait qualitativement la concurrence entre grossistes.

Affectation quantitative: Le caractère quantitativement notable de l'affectation de la concurrence s'apprécie en fonction de la concurrence externe (actuelle et potentielle), de la concurrence interne (actuelle et potentielle) et de la position des partenaires à l'échange.

Au titre de la concurrence externe, la Comco a constaté que la part de médicaments pouvant être directement fournis par les producteurs/importateurs hors Sanphar était très faible. Les quelques grossistes hors du système Sanphar n'ont quant à eux pas une position suffisamment forte pour influencer le marché et ne sauraient donc constituer une véritable concurrence. Enfin, comme il a déjà été mentionné ci-dessus, les importations parallèles de médicaments sont illégales. Il n'existe donc aucune concurrence externe *actuelle*. Les investigations du secrétariat ont de plus montré que la situation n'était pas prête de changer, si bien qu'il n'existe pas davantage de concurrence externe *potentielle*.

Concernant la concurrence interne, il a tout d'abord été constaté que tous les grossistes Sanphar respectaient l'accord. Il n'y a donc aucune concurrence interne *actuelle*, pas plus que de concurrence interne *potentielle* d'ailleurs, puisque les grossistes qui décideraient de ne plus respecter l'accord se verraient sanctionnés et discriminés par les producteurs.

Quant à la position des détaillants de la branche et des médecins dispensants, elle est trop faible pour leur permettre de faire pression sur les grossistes et d'exiger des rabais plus importants. Cela découle essentiellement du fait que la coopération dans les achats n'existe pratiquement pas, chacun passant ses commandes de manière individuelle.

L'absence de concurrence externe et/ou interne, de même que la faible position des partenaires à l'échange ont permis à la Comco d'estimer rempli le critère de la restriction quantitative, et par conséquent notable, de la concurrence.

Pas de justification pour des motifs d'efficacité économique: La LCart prévoit un certain nombre de raisons pouvant justifier un accord affectant notablement la concurrence (art. 5 al. 2). Cependant, aucune des prétendues justifications avancées par les parties ne remplissait les conditions légales. Aucune justification de la restriction illicite à la concurrence constatée n'a donc pu être apportée.

Accord au niveau du commerce spécialisé et des médecins ayant une autorisation d'auto-dispensation

L'accord Sanphar prévoit que les pharmaciens, les droguistes et les médecins dispensants des médicaments fixent leurs marges d'après un pourcentage, voire une somme déterminée par rapport au prix de vente au public des médicaments. Cela a pour conséquence que les médicaments sont tous vendus au même prix dans pratiquement tous les commerces sur le marché suisse de la distribution de médicaments aux patients par les commerces spécialisés et les médecins dispensants.

Les ordres de marge de Sanphar ont pour effet de fixer directement le prix auquel les commerçants spécialisés et les médecins dispensants vendent les médicaments au public. Le prix en tant que paramètre de la concurrence est ainsi totalement écarté. Il s'agit donc bien d'une entente sur les prix au sens de l'article 5 alinéa 3 lettre a LCart et la Comco a examiné s'il existait des indices permettant de renverser cette présomption d'illicéité. Il a été distingué entre la vente par les médecins dispensants d'une part et par les pharmacies et drogueries d'autre part.

a) Vente par les médecins dispensants:

La concurrence externe (actuelle et potentielle) est inexistante, puisque l'enquête a démontré que seul un très petit nombre de médecins ayant une autorisation d'auto-dispensiation n'était pas partie à l'accord Sanphar.

Tous les médecins membres se tiennent à l'accord et les nouveaux médecins entrant sur le marché n'ont pas de raisons de ne pas le faire. La Comco a donc pu constater qu'il n'existait pas non plus de concurrence interne actuelle ou potentielle.

b) Vente par les commerces spécialisés:

Bien qu'il existe des pharmacies ou drogueries non-parties à l'accord Sanphar qui n'appliquent pas les ordres de marge, leur nombre est trop restreint pour constituer une concurrence externe efficace. Cette remarque s'applique également à la concurrence interne.

La présomption de l'article 5 alinéa 3 lettre a LCart n'ayant pas pu être renversée, la Comco a conclu que les ordres de marge et de rabais de Sanphar supprimaient la concurrence efficace entre commerçants spécialisés et médecins dispensants.

Accord sur les conditions imposées aux grossistes

Pour obtenir des producteurs/importateurs la livraison de médicaments aux conditions accordées aux grossistes, il est nécessaire de remplir un certain nombre de critères, parmi lesquels la gestion d'un assortiment minimum et un cercle de clientèle défini. La Comco a constaté une affectation notable de la concurrence sur le marché suisse de la distribution de médicaments par les grossistes:

Affectation qualitative: La Comco a considéré que l'exigence d'un assortiment minimum pouvant couvrir aussi bien la demande des pharmacies, des drogueries, que des médecins dispensants, constituait une énorme barrière à l'entrée de ce marché. En effet, en pratique seuls les grossistes d'une certaine taille et déjà bien implantés peuvent remplir une telle exigence.

Affectation quantitative: Comme il ressort des considérations relatives à l'affectation quantitative de l'entente sur les ordres de marges et de rabais au niveau des grossistes, il n'y a aucune concurrence externe ou interne, potentielle ou actuelle, susceptible de jouer un rôle important. La même constatation vaut pour la position des partenaires à l'échange. Les conditions imposées aux grossistes restreignant donc de manière notable la concurrence, il ne restait qu'à examiner si une telle restriction pouvait se justifier par des motifs d'efficacité économique.

Pas de justification pour des motifs d'efficacité économique: A ce titre, les parties ont fait valoir des motifs de sécurité, de politique de la santé ou de maintien de la qualité. Or, il ne s'agit pas de motifs d'efficacité économique au sens de l'article 5 alinéa 2 LCart. L'intérêt public à un approvisionnement du pays en médicaments qualitativement et quantitativement suffisant est d'ailleurs déjà pris en compte par un

certain nombre de dispositions légales. Il n'appartient pas à un système de normes privées de compléter ces dispositions.

Au vu de ces constatations, la Comco a jugé que les conditions imposées aux grossistes par Sanphar pour être traités comme tels étaient illicites car restreignant de manière notable la concurrence.

Les résultats de l'enquête ont démontré que:

- les ordres de marge et de rabais de Sanphar aux niveaux des producteurs/importateurs, des grossistes et des commerçants spécialisés/médecins dispensants constituaient des ententes illicites au sens de l'article 5 alinéa 1 respect. alinéa 3 LCart.

- les conditions imposées aux grossistes exigeant la tenue d'un assortiment minimum de même que la livraison d'un certain cercle de clients constituaient une entente illicite au sens de l'article 5 alinéa 1 LCart.

En conséquence de quoi, la Comco a pour l'essentiel interdit à l'association Sanphar et à ses membres d'appliquer les ordres de marge et de rabais ainsi que les conditions pour les grossistes.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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OECD Global Forum on Competition

CONTRIBUTION FROM UKRAINE

-- Anticompetitive concerted actions (Session IV) --

This contribution was submitted by Ukraine as a background material under Session IV for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

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English text only

ANTICOMPETITIVE CONCERTED ACTIONS WITH WHICH THE ANTIMONOPOLY COMMITTEE OF UKRAINE DEALT IN 2000 THROUGH THE FIRST HALF OF 2001

1. Anticompetitive concerted actions of the Public Company *Dnipronaftoprodukt* and the Limited-Liability Company *Avias* which resulted in setting monopoly prices.

The participants operate on markets of retail trade in petrol and diesel oil in Dnipropetrovska region.

The actions took place in the second quarter of 1999.

Available evidence to prove the existence of collusion: documents (letters, orders) concerning the simultaneous raising of retail prices of oil products to a uniform level.

Detected harmful outcomes: the removal of competition between the mentioned economic entities resulted in a rise in prices of petrol and diesel oil in Dnipropetrovska region.

Penalties: the fine equal to 28,000 hryvnias was imposed on the participants in the concerted actions.

2. Anticompetitive concerted actions of the Limited-Liability Companies *Poshuk-Service, Delta-Azov, Interkvant,* and *Interkvant-Service* which resulted in setting monopoly tariffs.

The participants operate on the market of servicing electronic cash-machines in the city of Mariupol, in Pershotravnevy, Novoazovsky, and Volodarsky districts of Donetska region, with the Limited-Liability Companies *Poshuk-Service* and *Delta-Azov* occupying a monopoly position on the mentioned market.

The actions took place in 1999 through the first quarter of 2000.

Available evidence to prove the existence of collusion: a meeting and a written agreement between servicing centres on raising tariffs and setting uniform tariffs of servicing electronic cash-machines.

Detected harmful outcomes: the servicing centres, setting uniform prices, removed competition among themselves, which relieved them of taking measures to raise the quality of their services. In addition, anticompetitive concerted actions of the Limited-Liability Companies *Poshuk-Service, Delta-Azov, Interkvant,* and *Interkvant-Service* enabled them to raise their tariffs of their services in 1.5 times.

Penalties: the fine equal to 12,900 hryvnias was imposed on the participants in the concerted actions.

3. Anticompetitive concerted actions of the Private Enterprise *S. I. M.* and the Donetsk City Special Medical Association *Narkologichny Tsentr* which resulted in setting monopoly tariffs.

The participants in the actions operate on the market of rendering services in the sphere of the compulsory preventive narcotic examination of the population of the city of Donetsk, with the Donetsk City Special Medical Association *Narkologichny Tsentr* occupying a monopoly position on the mentioned market.

The concerted actions took place in February 1999 through June 2000.

Available evidence to prove the existence of collusion: the agreement between the Donetsk City Special Medical Association *Narkologichny Tsentr* and the Private Enterprise *S. I. M.* on joint activities of 8 February 1999 No 1.

Detected harmful outcomes: the Donetsk City Special Medical Association *Narkologichny Tsentr* and the Private Enterprise *S. I. M.* are potential competitors, but as a result of the conclusion of the agreement the possibility of competition between them was removed and tariffs of rendering services in the sphere of the compulsory preventive narcotic examination of the population of the city of Donetsk increased in 1.74 times.

Penalties: the fine equal to 1,400 hryvnias was imposed on the participants in the concerted actions.

4. Anticompetitive concerted actions of the Collective Enterprise *Kvarts* and the Limited-Liability Production and Commercial Company *Planeta* (the city of Yenakiyeve) which resulted in setting monopoly tariffs.

The concerted actions took place in 1999 and 2000.

The participants in the concerted actions operate on the market of rendering services in the sphere of servicing electronic cash-machines in the territory of the cities of Yenakiyeve, Svitlodarsk, Vuglegirsk, and Yunokomunarsk and in the territory of the town of Myronivske. The Limited-Liability Production and Commercial Company *Planeta* occupied a monopoly position on the mentioned market in 1998 and 1999.

Available evidence to prove the existence of collusion: in 1999 the Collective Enterprise *Kvarts* set tariffs which were equal to those set by the Limited-Liability Production and Commercial Company *Planeta* and which did not compensate for its expenses, that is the Collective Enterprise *Kvarts* acted contrary to common economic motivation. Calculations show that expenses of the participants differed significantly, but uniform tariffs had been established and maintained simultaneously for 2.5 years. In addition, the participants in the actions, having established the uniform tariffs, significantly reduced their expenditures on advertising.

Detected harmful outcomes: concerted actions of the Collective Enterprise *Kvarts* and the Limited-Liability Production and Commercial Company *Planeta* removed competition from the market.

Penalties: the fine equal to 400 hryvnias was imposed on the participants in the concerted actions.

5. Anticompetitive concerted actions of the *Self-Supporting Association of Markets of the City of Vinnytsia,* the Limited-Liability Company *AMiK,* and the Private Enterprise *Yunist.*

The participants in the actions operated on the market of rendering complex services in the sphere of allocating places for trading in both industrial and food products within the city of Vinnytsia, with their joint market share being able to ensure a monopoly position on the market.

The actions took place in June 1998 through 1999.

Available evidence to prove the existence of collusion: a document (agreement) about agreed uniform tariffs of services to be rendered on markets of the city of Vinnytsia.

Detected harmful outcomes: coming to an agreement, by the participants in the actions, about tariffs of the complex services in the sphere of allocating places for trading in both industrial and food products on markets of the city of Vinnytsia and the actual application of the agreed tariffs resulted in the removal of competition from the market.

Penalties: the fine equal to 7,000 hryvnias was imposed on the participants in the concerted actions.

6. Anticompetitive concerted actions of the Closed Company *Volynsky Remontno-Montazhny Kombinat,* the Collective Enterprise *Impuls,* the Limited-Liability Company *Agrovest* which resulted in setting monopoly prices.

The concerted actions of the participants took place in 1996 through 1997.

The participants operate on markets of servicing electronic cash-machines in the territory of Volynska region, with the Collective Enterprise *Impuls* occupying a monopoly position on markets within the towns of Novovolynsk and Volodymyr-Volynsky and within Gorokhivsky, Ivanychivsky, and Lokachynsky districts and with the Closed Company *Volynsky Remontno-Montazhny Kombinat* occupying a monopoly position within Manevytsky and Liubeshivsky districts.

Available evidence to prove the existence of collusion: minutes of meetings which confirm that decisions to approve uniform (for all the participants in the market) norms of time necessary for repairing units and blocks of electronic cash-machines and decisions to set the uniform cost of servicing electronic cash-machines were taken.

Detected harmful outcomes: setting uniform prices of servicing electronic cash-machines, with the participation of the Closed Company *RMK*, the Collective Enterprise *Impuls*, the Limited-Liability Company *Agrovest*, resulted in setting monopoly tariffs, in dividing the market in accordance with the territory principle, and in monopolising the market.

Penalties: the fine equal to 400 hryvnias was imposed on the participants in the concerted actions.

7. Anticompetitive concerted actions of the Zaporizhia Production Association for Rendering Agricultural and Chemical Services to Agriculture *Agros* and 17 district agricultural and chemical enterprises which resulted in setting monopoly tariffs.

The concerted actions of the participants took place in 1997 through 1999.

The participants operated on the market of intermediary (organisation) services to be rendered in the course of supplying mineral fertilisers and means of plant protection within Zaporizka region, with the Zaporizhia Production Association for Rendering Agricultural and Chemical Services to Agriculture *Agros* occupying a monopoly position on the mentioned market within Zaporizka region.

Available evidence to prove the existence of collusion: joint agreements.

Detected harmful outcomes: setting uniform prices of the organisation services to be rendered in the course of supplying mineral fertilisers resulted in weakening competition on the market of agricultural products.

Penalties: the fine equal to 4,570 hryvnias was imposed on the participants in the concerted actions.

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THINK ANTITRUST: THE ROLE OF ANTITRUST ENFORCEMENT IN FEDERAL PROCUREMENT

This note was submitted by the US Department of Justice as a contribution to Session IV of the Global Forum on Competition (17-18 October 2001). This note is available only in PDF format.

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THINK ANTITRUST:

THE ROLE OF ANTITRUST ENFORCEMENT IN FEDERAL PROCUREMENT

I. PREFACE

Price fixing, bid rigging and other typical antitrust violations have a more devastating effect on the American public than any other type of economic crime. Such illegal activity contributes to inflation, destroys public confidence in the country's economy, and undermines our system of free enterprise. In the case of federal procurement, such crimes increase the costs of government, increase taxes and undermine the public's confidence in its government.

Because government procurement officials receive bids and award government purchasing orders, they are in a good position to observe and identify violations of the antitrust laws. Other important players in the fight to maintain the free flow of competition include agency auditors-investigators, and local state administrators of federally funded projects, and federal supervisors of such state activities. If all those involved in procurement have a working knowledge of the antitrust laws and understand how to identify violations, they can make a significant contribution to law enforcement[1].

This paper, prepared by the Justice Department's Antitrust Division, is designed primarily for procurement and contract specialists, and for investigative and audit personnel[2]. The text outlines the purposes of the antitrust laws, briefly describes what conduct violates the laws and what penalties may be imposed, and then focuses on how to detect price fixing and bid rigging. Steps that individual agency employees can take to seek out actual evidence of collusion are suggested, along with ways that agency procurement can be administered to stimulate competition and inhibit anticompetitive behavior. Finally, methods that can be implemented on an agency-wide basis to sensitize procurement and auditing employees to antitrust violations and encourage them to THINK ANTITRUST are suggested.

II. ANTITRUST VIOLATIONS AND PUBLIC AGENCIES

The Federal antitrust laws were enacted to preserve our system of free competition. They serve as our primary defense against unlawful attempts to limit competition and increase the purchase price of products and services.

As a major purchaser of goods and services, public agencies can be both prime targets for, and sensitive detectors of, antitrust violations. If you detect an antitrust violation, you can perform a triple public service: (1) you can end a practice that is costing your agency money and is costing consumers and taxpayers millions of dollars; (2) you can also bring monies to the treasury, since criminal penalties collected in antitrust enforcement go into the general treasury fund; and (3) you can help recoup the additional prices paid since the government may bring antitrust damage actions and actions under the False Claims Act.

III. FEDERAL ANTITRUST ENFORCEMENT

The Sherman Act (15 U.S.C. §1) prohibits any agreement among competitors to fix prices[3]. Criminal enforcement of the Sherman Act is the responsibility of the Antitrust Division of the United Stated Department of Justice. Violation of the act is a felony punishable by a fine of up to $10 million for corporations, or twice the loss caused to the victims or twice the gain derived from the conspiracy, whichever is greater, and three years imprisonment and up to $350,000 or twice the loss or gain from the conspiracy, whichever is greater, for individuals. In addition to a criminal violation of the antitrust laws, collusion among competitors may also form the basis for violation of other Federal criminal statutes, including the frauds and swindles statute (18 U.S. C. §1341) (formerly the mail fraud statute) and making a false statement to a government agency (18 U.S.C. §1001). Both of these felony violations are punishable by a fine and imprisonment of up to 5 years. Civil action for injunctive relief, for actual damages under 15 U.S. C. §15a and for double damages under the False Claims Act (31 U.S.C. §231 et seq.), are also effective enforcement tools.

IV. BID RIGGING, PRICE FIXING, AND OTHER TYPES OF COLLUSION

Commencement of criminal prosecution under Section 1 of the Sherman Act, requires that the unlawful "contract, combination or conspiracy" have existed within the previous five years. The offense most likely to arise in a procurement context is commonly known as "price fixing" or "bid rigging", and also referred to as "collusion." An express agreement is not always necessary, and the offense can be established either by direct evidence (such as the testimony of a participant) or by circumstantial evidence (such as bid awards that establish a pattern of business being rotated among competitors). Any agreement or informal arrangement among independent competitors by which prices or bids are fixed is *per se* unlawful. Where a *per se* violation is shown, defendants cannot offer any evidence to demonstrate the reasonableness or the necessity of the challenged conduct. Thus, competitors may not justify their conduct by arguing that price fixing was necessary to avoid cut-throat competition, or that price fixing actually stimulated competition, or that it resulted in more reasonable prices.

Price fixing among competitors can take many forms. For example, competitors may take turns being the low bidder on a series of contracts, or they may agree among themselves to adhere to published list prices. It is not necessary that all competitors charge exactly the same price for a given item; an agreement to raise present prices by a certain increment is enough to violate the law. Other examples of price fixing include: (1) agreements to establish or adhere to uniform price discounts; (2) agreements to eliminate discounts: (3) agreements to adopt a standard formula for the computation of selling prices; (4) agreements not to reduce prices without prior notification to others; (5) agreements to maintain specified discounts; (6) agreements to maintain predetermined price differentials between different quantities, types or sizes of products; and (7) agreements not to advertise prices. Usually, but not always, price-fixing conspiracies include mechanisms for policing or enforcing adherence to the prices fixed.

V. TYPICAL ANTITRUST VIOLATIONS

The following section describes common bid-rigging patterns that agency personnel may be able to recognize.

A. BID SUPPRESSION

In "bid suppression" or "bid limiting" schemes, one or several competitors (who would otherwise be expected to bid or who have previously bid) refrain from bidding or withdraw a previously submitted bid, so that a competitor's bid will be accepted. In addition, fabricated bid protests may be filled to deny an award to a non-conspirator.

B. COMPLEMENTARY BIDDING

"Complementary bidding" (also known as "protective" or "shadow" bidding) occurs when competitors submit tokens bids that are too high to be accepted (or if competitive in price, then on special terms that will not be acceptable). Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine bidding. This enables another competitor's bid to be accepted when the agency requires a minimum number of bidders.

C. BID ROTATION

In "Bid rotation," all vendors participating in the scheme submit bids, but by agreement take turns being the low bidder. A strict bid rotation defies the law of change and suggests collusion.

Competitors may also take turns on contracts according to the size of the contract. Many cases of bid rigging have been exposed in which certain vendors or contractors get contracts valued above a certain figure, while others get contracts worth less than that figure.

Subcontracting is another area for attention. If losing bidders or non-bidders frequently receive subcontracts from the successful low bidder, the subcontracts (or supply contracts) may be a reward for submitting a non-competitive bid or for not bidding at all.

D. MARKET DIVISION

Market division schemes are agreements to refrain from competing in a designated portion of the market. Competing firms may, for example, allocate specific customers or types of customers, so that one competitor will not bid (or will submit only a complementary bid) on contracts let by a certain class of potential customers. In return, his competitors will not bid on a class of customers allocated to him. For example, a vendor of office supplies may agree to bid only on contracts let by certain Federal agencies, and refuse to bid on contracts for military bases.

Allocating territories among competitors is also illegal. This is similar to the allocation-of-customers scheme, except that geographic areas are divided instead of customers.

VI. DETECTING BID RIGGING, PRICE FIXING, AND OTHER TYPES OF COLLUSION

Certain patterns of conduct suggest that illegal restraints on trade have been established. The following is a checklist of some factors, any one of which may indicate collusion. Agency personnel should, therefore, be sensitive to their occurrence.

A. CHECKLIST FOR POSSIBLE COLLUSION

1. Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates. (This could indicate complementary bids.)
2. Fewer competitors than normal submit bids. (This could indicate a deliberate plan to withhold bids.)
3. The same contractor has been the low bidder and has been awarded the contract on successive occasions over a period of time.
4. There is an inexplicably large dollar margin between the winning bid and all other bids.
5. There is an apparent pattern of low bids regularly recurring, such as corporation "X" always winning a bid in a certain geographical area for a particular service, or in a fixed rotation with other bidders.
6. A certain company appears to be bidding substantially higher on some bids than on other bids, with no logical cost difference to account for the difference.
7. A successful bidder repeatedly subcontracts work to companies that submitted higher bids on the same projects.
8. There are irregularities (e.g., identical calculation errors) in the physical appearance of the proposals, or in the method of their submission (e.g., use of identical forms or stationery), suggesting that competitors had copies, discussed, or planned one another's bids or proposals. If the bids are obtained by mail, there are similarities of postmark or post metering machine marks.
9. Two or more competitors file a "joint bid", even though at least one of the competitors could have bid on its own.
10. A bidder appears in person to present his bid and also submits the bid (or bond) of a competitor.
11. Competitors regularly socialize or appear to hold meetings, or otherwise get together in the vicinity of procurement offices shortly before bid filing deadlines.
12. Competitors meet as a group with procurement personnel to discuss or review terms of bid proposals. (This may facilitate subtle exchange of pricing information.)
13. Competitors exchange any form of price information among themselves. (When this occurs among sellers in concentrated markets [markets with few sellers], it is suspicious. Note that such exchanges may take quite subtle forms, such as public discussions of the "right" price.)
14. There is industry-wide resale price maintenance[4]. (This could help manufacturers police collusion at the manufacturing level, since any reduction in the resale price, which is both easily observable and known to be controlled by the manufacturer, is readily detected by other manufacturers to account for the extra cost of the transportation expense.)
15. Competitors submit identical bids or frequently change prices at about the same time and to the same extent. (Regulations currently permit submission of identical bid data to the Antitrust Division.)
16. Bidders that ship their product short distances to the buyer charge the same price as those that ship long distances. (This may indicate price fixing, since otherwise the distant sellers would probably charge more for a given item to account for the extra cost of the transportation expense.)
17. Local competitors are bidding higher prices for local delivery than for delivery to points farther away. (This may indicate rigged prices in the local market.)
18. Bid prices appear to drop whenever a new or infrequent bidder submits a bid.

B. SUSPICIOUS STATEMENTS

Sometimes, statements made by marketing representatives of suppliers suggest that price fixing is afoot. Example of such statement

1. Any reference to "Association price schedules," "industry price schedules," "industry suggested prices," "industry-wide" or "market-wide" pricing.
2. Justification for the price or terms offered "because they follow industry (or industry leaders) pricing or terms," or "follow (a named competitor's) pricing or terms."
3. Any reference to "industry self-regulation," etc., such as justification for price or terms "because they conform to (or further) the industry's guidelines" or "standards."
4. Any references that the representative's company has been meeting with its competitors for whatever reason.
5. Justification for price or terms "because our suppliers, etc., require it" or "because our competitors, etc., charge about the same," or "we all do it."

Statements by marketing representatives or in company promotional materials may also suggest the existence of agreements among competitors to divide territories or customers. (This is also known as market allocation.) Highly suspicious examples are:

1. Any references that the representative's company "does not sell in that area," or that "only a particular firm sells in that area," or deals with that business."
2. Statements to the effect that such and such salesman (of a competitor) should not be making particular proposals to you, or should not be calling on you.
3. Statements to the effect that it is a particular vendor's "turn" to receive a particular job or contract.

Consultations among purchasing agencies that procure the same services or commodities can reveal whether vendors are selling to some agencies but not to others, or if vendors appear to be limiting their selling to particular or selective units within a given agency. Such behavior suggests customer allocation.

C. CONDITIONS FAVORABLE TO COLLUSION

While price fixing can occur in almost any industry, it is most likely to occur in industries where only a few firms compete, and where the products of those firms are similar.

The bread, milk, and steel industries are examples. Procurement officials should be sensitive to industry conditions that increase the probability of collusion. Thus:

1. Collusion is more likely to occur if there are few sellers. The fewer the sellers, the easier it is for them to get together and agree on prices. Collusion may also occur when the number of firms is fairly large, but there are a small group of major sellers and the rest are "fringe" sellers who control only a small fraction of the market.
2. The probability of collusion increases if the product cannot easily be substituted for another product. The gains from colluding will be high if the product has few, if any good substitutes.
3. The more standardized a product is, the easier it is for competing firms to reach agreement on a common price structure. It is much harder to agree on such forms of competition such as quality or service.

D. COLLECTING RELEVANT INFORMATION

Certain information and types of documents are especially useful to agency investigators pursuing antitrust violations and to prosecutors at the Department of Justice. This list includes the documents and information that will be useful if a Justice Department investigation begins.

1. Information

(a) Indicate the agency's annual dollar value of purchases of the item in each of the three calendar or fiscal years (depending on how you keep the data) preceding the year in which you received the suspect bids.

(b) State whether the pattern of bidding in the three year period preceding the receipt of the suspect bids appears to indicate bid rigging, bid rotation, sharing of the business, collusive bidding, or any other form of joint action. Explain[5].

As this information is collected, "suspect projects" can be identified. You will be able to focus on the most promising projects, i.e., those where there are few bidders and the bids seem suspiciously high in relation to the estimate or prior bids. You will also be able to identify the companies that consistently bid on particular contracts and determine whether they are taking turns being the low bidder.

(c) If there are any known financial, personal, or other relationships among any of the suspect bidders, describe them.

(d) Indicate whether the Government's specifications are such that only one or a limited number of potential bidders are capable of meeting them.

(e) If there are any known manufacturers or suppliers of the item who consistently avoid bidding on Government contracts, identify them and indicate whether the procurement agency knows why these firms do not seek Government business.

(f) Determine whether one bidder is uniformly low on bids to a particular awarding authority, on particular items, or in particular geographic areas. (If the pattern cannot be explained in economic terms, there may be unlawful allocation of customers or territories.)

(g) Determine whether each bidder enjoyed a constant percentage of the total business over a period of years. (If so, there may be an unlawful division of total business.)

(h) Indicate whether or not the prices bid by the suspect bidders are identical to their published list prices. If the prices quoted by the suspect bidders are not their published list prices, state whether the bids appears to have been derived by the application of a uniform "Government discount" from list prices, or by some other method of computation. If available, furnish photostatic copies of suspect bidders' and other bidders' standard price lists.

(I) Indicate whether there appears to be a territorial division by competitors. One way to do this is to assign each competitor a different color. Then, using a map of the purchasing area, appropriately colored pins (or tabs) can be inserted for each location where a contract is awarded. If clusters of the same color are found throughout the area, there may be an illegal allocation of territories.

2. Documents

(a) A copy of the invitation for bids, and any amendments thereto, and a list of all parties invited to bid.

(b) An abstract of all bids received for each item covered by the bid invitation, showing for each such bid:
   (I) The unit and total price bid
   (ii) The net price to the Government after discounts and allowances for transportation, or other costs.
   (iii) The destination of shipments, and whether the price quoted includes or excludes the cost of transportation to destination.
   (iv) The identity of the successful bidder; where identical low bids were submitted by several bidders, indicate how the award was made.

(c) Copies of documents filed by suspect bidders as part of the bid submission or obtained by the procuring agency, such as the following:
   (I) Evidence of financial or other ties between suspect bidders (as revealed by Dun and Bradstreet or other reliable financial reports).
   (ii) Copies of reports containing the findings of any special investigations conducted by the procurement agency concerning the bids at issue including inquiries related to any bid protests.
   (iii) Copies of all correspondence between the procurement agency and the suspect bidders.
   (iv) Copies of any certificates of independent price determination or non-collusion submitted by the bidders[6].
   (v) You should save the original bids, envelopes, and affidavits of non-collusion for all bidders. In addition, you should save the log recording government mailings to the bidders, including notice of awards, checks and notices to proceed[7]. These will be important as evidence in the event any action is taken.

VII. ENCOURAGING COMPETITION

Procurement officers can assist in the enforcement of the antitrust laws not only by playing an active role in the detection of collusive bidding, but also by taking positive steps to stimulate competition and prevent collusive behavior. This section discusses some of the procedures that can be established to discourage anticompetitive activity.

A. EXPAND LIST OF BIDDERS

It is much more difficult for a large group of competitors to collude than for a small group. To reduce the ability of conspirators to coordinate illegal activities, buyers should solicit as many reliable sources as economically possible. As the number of bidders increases, the probability of successful collusive bidding decreases. Soliciting numerous suppliers will not necessarily prevent a conspiracy, but it can reduce the effectiveness of a conspiracy by providing a larger competitive base. While there is no magic number of bidders above which collusion does not occur, past experience suggests that collusion is more likely to arise where there are ten or fewer competitors.

B. CONSOLIDATE PURCHASES

Another defensive tactic available to agencies is to combine orders. The existence of a large number

of contract opportunities facilitates collusion among sellers. When buyers are numerous, and each purchases only a small amount, sellers have less incentive to grant price cuts. Consolidation of purchases tends to increase the value of winning the bid. A firm, even if part of a conspiracy, may be tempted to cheat and take the prize.

C. AWARDING THE BIDS

Not all identical bids are the result of a price fixing conspiracy. However, procurement officers should not inadvertently encourage tie bids by assuring identical bidders an equal or reasonable share of the buyers's business. From a seller's standpoint it may be better to share business equally with other suppliers at a significantly higher price than to have an uncertain share of the business at lower competitive prices. Thus, in a tie bid situation, agencies should consider reletting the contract, or some way to award the bid to one of the tied bidders. A lottery system of awarding contracts should not be used.

D. KEEP THE PROCESS SECRET

You should consider not publicly disclosing the identity of proposal holders or bidders. This will help prevent competitors from knowing who to contact. You should also consider not publicly disclosing the government's estimate so that bidders do not have an incentive to use that estimate as the floor for their bids.

VIII. SOME OVERALL STEPS TO TAKE TO DETECT AND DETER COLLUSION

All buyers and in particular federal agencies, have a tremendous stake in detecting and deterring price fixing. In fiscal 1999 federal procurement alone amounted to over $198 billion of which about $125 billion was competitively let or a follow-up to competed action. Without doubt, some contracts are the subjects of collusion like bid rigging. It is up to procurement personnel to understand the applicable law, to limit opportunities for collusion and to seek out evidence of violations for prosecution. If the vendor community realizes that you mean business in antitrust enforcement, the dollars saved can be spent on more worthwhile projects. This section summarizes programs that a buying authority should consider adopting as a matter of policy:

1. Assure that procurement and contract personnel, auditors and investigators understand the elements of collusion, such as bid rigging and market allocation. Provide instruction on how to detect collusion, etc. (The Antitrust Division can assist you.) Stress the importance (to the agency and to the taxpayer) of preventing and detecting collusion. In short, THINK ANTITRUST.

2. Have procurement records, e.g., bid lists, abstracts, awards, readily available. Looking at a single contract is not enough because records of past bids are needed to determine if a pattern of allocation or rotation is present. Data collection forms should be employed, with the raw information subsequently compiled and, where feasible, programmed for storage in a computer. This makes routine analysis simple and keeps you aware of patterns. It may also be prudent to advise the bidders that you conduct this type of analysis periodically.

3. Reports of suspected collusion (based upon a bid analysis, an adult, a complaint from other competitors, or statements by persons who appear knowledgeable, e.g., former employees) should be communicated within the agency and to the Antitrust Division along established,

readily available channels. If other federal violations also appear to be present, e.g., false statement (18 U.S.C. §1001); frauds and swindles (18 U.S.C. §1341) or conspiracy to defraud (18 U.S.C. §371), these offenses can also be prosecuted by the Antitrust Division if they are related to the types of collusion described here. If it does not, the Antitrust Division will refer it to an appropriate U.S. Attorney. If the Antitrust Division is contacted promptly, a determination can be made whether:

(a) additional facts are needed;
(b) a formal Antitrust Division investigation should be commenced. If so, an appropriate Antitrust Division section or field office will be assigned to work with the agency and its investigators to develop the case; or
(c) the allegations do not suggest an antitrust violation. If other federal violations appear to be present, the agency will be advised to contact an appropriate U.S. Attorney or the Criminal Division within the Department of Justice.

4. Encourage informal communications between agency personnel (e.g., procurement, audit, investigative and legal staff) and Antitrust Division personnel whenever a potential bid rigging situation is encountered.
5. The agency should consider rewarding agency employees responsible for detecting and developing information that may result in antitrust or fraud prosecutions.

IX. CONCLUSION

This paper is meant only as a beginning point. The Antitrust Division looks forward to working together with you to make antitrust enforcement a fundamental feature of your procurement activities. We warmly welcome your support. We solicit readers' views on this paper, and hope to incorporate suggestions in future revisions. Please contact Scott D. Hammond, the Director of Criminal Enforcement, with your comments and inquiries. He can be reached at (202) 514-3543. His address is Department of Justice, Antitrust Division, 950 Pennsylvania Ave., N.W., Washington, DC 20530.

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NOTES

1. Although these comments will be directed toward the purchasing process, they also apply to sales by the government of surplus items and other commodities on a competitive basis.

2. This paper draws extensively from: "Government Purchasing and the Antitrust Laws", a joint publication of the National Association of Attorneys General and the National Association of State Purchasing Officials, May 1972; "A Treatise on State Antitrust Law and Enforcement: With Models and Forms", Robert R. Fellmeth and Thomas A. Papagorge, Antitrust & Trade Regulations Report Supplement 1 Issue No. 892, December 7, 1978; and chapter 13 of the Department of Transportation's Operating Procedures Manual, "Antitrust Investigations," prepared by DOT's Office of Inspector General in consultation with the Justice Department's Antitrust Division, May, 1981.

3. The operative language of the act reads as follows:

   Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy . . . shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation or if any other person, three hundred and fifty thousand dollars or by imprisonment not exceeding three years, or by both . . . . [2 July 1890, Chap. 647, sec. 1, 2b State. 209, as amended, 15 U.S.C.A. sec. 1.

4. I.e., each manufacturer sets the price at which all of his distributors, resellers, etc. must sell the product to their customers.

5. In order to detect bid rotations, accurate records of bid tabulations over a period of time are essential. It is most helpful if you computerize the following data for each contract let: (1) the identity of each firm that received an invitation to bid, (2) the identity of a firm that submitted a bid, along with the amount of the bid and the variance between the bid and the agency's estimate, if there is one, and (3) the identity of the winning bidder. A typical procurement action could appear on a computer printout as follows:

   Project:_____ Date:_____ Estimate: $100,000

	Co. Winner	Bid	Variance From Estimate
1.	Co.	$110,000	+10%
2.	Co.	$120,000	+20%
3.	Co.	$130,000	+30%

6. Such documents are needed to determine if any additional federal crime of making false statements to the government under 18 U.S.C. § 1001 has been committed.

7. This documentation will determine whether the federal crime of frauds and swindles (18 U.S. C. §1341) was committed.

Session V.

Merger Review - Focus on Co-operation in Transborder Transactions

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

12-Sep-2001

English - Or. English

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP(2001)1
Unclassified

OECD Global Forum on Competition

MERGER ENFORCEMENT AND INTERNATIONAL CO-OPERATION

-- Note by the Secretariat --

This document provides background information and suggested issues for the discussion concerning mergers that will take place at the Global Forum on Competition on 18 October 2001.

JT00112450

English - Or. English

OECD GLOBAL FORUM ON COMPETITION

MERGER ENFORCEMENT AND INTERNATIONAL CO-OPERATION
(Note by the Secretariat)

Introduction

1. The OECD Global Forum on Competition will discuss merger law enforcement and international co-operation on 18 October 2001. Although the discussion is intended to focus primarily on co-operation in transborder merger investigations, this session will also contain some discussion of issues involved in establishing a merger review programme. Submissions specifically for this session will be put on OLIS and on the Forum website as they are received.

2. The Forum's discussion of international co-operation in merger cases is intended to build on a "roundtable" discussion of the same topic that was held on 29 May 2001 in Working Party No. 3. For Members and Forum Invitees, this note provides a very brief summary of the previous documentation and identifies a number of issues that may not have been fully explored in May or merit additional discussion in the context of the Forum. As background for Invitees, the Secretariat is drafting a Working Document containing relevant documentation relating to that meeting, including (1) a Secretariat note that presents the central issues, (2) six submissions by Members, and (3) an aide memoire that summarises the discussion.

The previous roundtable

3. The issues paper for the May meeting raises several topics relevant to international co-operation in merger investigations and cases, including the types of transactions and issues that benefit from co-operation, the methodology of merger co-operation, means of engaging the merging parties in the co-operation process and issues relating to the development of specific bilateral co-operative relationships.

4. The paper notes that "horizontal" mergers, or those that involve parties that compete against one another in a given market, are most commonly the subject of investigations by competition agencies, in both the domestic and international contexts. Parties can co-operate on almost every relevant issue in a merger investigation, but one that has seen especially fruitful co-operation in recent cases is the remedy phase, in which the national competition agencies co-ordinate their decisions on divestitures to ensure consistent results across countries.

5. Co-operation between competition agencies usually occurs informally. It is important to begin the process as early as possible in the course of the investigation. Rules governing the protection of confidential information forbid the exchange of much non-public information developed by national competition agencies in the course of their investigations, but co-operating agencies can and do discuss "deliberative process" information, relating to their analysis and conclusions about certain issues in the case, such as market definition.

6. When more than one competition agency investigates a merger there is a convergence of interests of the merging parties and the agencies in completing the investigation quickly and with consistent results. Thus, the merging parties are often willing to consent to the exchange of otherwise confidential information by co-operating agencies by granting waivers of confidentiality restrictions. Obtaining such waivers can be critical to the success of the co-operative effort. Merging parties sometimes express misgivings about granting waivers, but the record of national agencies in protecting against unauthorised

disclosure of confidential information has been excellent to date. Different types of waivers are granted by the parties, depending on the circumstances of each case.

7. Finally, the issues paper discusses the different types of co-operative relationships that have developed in recent years. The most notable and most successful bilateral co-operative relationship is that between the European Commission and the United States. There are several examples of successful co-operation between other countries, however, often on an ad-hoc, case-by-case basis. In a potentially important development, the three Nordic countries of Denmark, Iceland and Norway have recently entered into a formal agreement that provides for the exchange of confidential information between the competition agencies of those countries. This agreement, which is supported by underlying laws of the three countries that permit such exchanges, could substantially enhance the ability of the signatory countries to co-operate meaningfully in merger investigations.

8. The country submissions for the roundtable discussion discuss specific cases in which there was co-operation with another agency or agencies, describing the means by which the co-operation was accomplished. The papers describe specific bilateral co-operative relationships that have been created in recent years. They list factors that contribute to the success of co-operation in merger investigations, the lessons learned from past cases, and some of them provide suggestions for the future enhancement of international co-operation in merger cases.

9. The aide memoire is a detailed description of the roundtable discussion. Several themes were developed in the discussions. Timing is important to successful international co-operation in merger control. Co-operating competition agencies should begin their discussions as early as possible in the process. While the exchange of confidential information is sometimes important, there can be meaningful co-operation without it, as countries can exchange and discuss publicly available information as well as their theories and conclusions, for example about market definition and remedies. Finally, the roundtable established that while the structure of co-operation – bilateral and multilateral international agreements – can be useful in establishing a framework for co-operation, far more important is the development of a productive working relationship between competition agencies, which is nurtured by frequent, informal contacts between professionals at all levels in the agencies.

Possible issues for further discussion

10. The following issues are suggested for discussion during the Forum's consideration of co-operation in transborder mergers.

- *International co-operative relationships tend to develop over time, between countries that most often are jointly affected by the same mergers. The most active international relationships among OECD Member countries include: EC – U.S., Nordic countries, Canada – U.S, Australia – New Zealand, and among various EU Member States. What factors contribute to the development of such relationships, e.g., size of economy, geographic proximity, significant trade relationships? What other working relationships have been developed between economies worldwide?*

- *Almost all of the cases discussed in the May roundtable involved co-operation between two, or at most a few, countries. Some mergers can affect many countries, however. A few of these have been investigated by many competition agencies simultaneously or closely in time. Coca-Cola/Cadbury Schweppes is a recent and perhaps the best example of such a transaction. Have there been others? What are special issues relating to these transactions that affect co-operation? How can simultaneous co-operation among more than a few countries be enhanced?*

- *The May roundtable established that the willing participation of the merging parties is important to the success of the co-operative effort, most often in the form of their granting waivers of confidentiality protections. The private sector expresses concerns about granting such waivers in situations where the parties are uncertain about the ability of the receiving country to protect confidential information. What has been the experience when a waiver was requested by or on behalf of a developing country or one that has only recently begun exercising merger control? What can be done to enhance the parties' confidence that the information will be protected in these situations?*

- *There can be co-operation when only one country has competitive concerns about a merger, for example when the investigating country requests the assistance of another country in obtaining evidence or in analysing a case or issue. Such assistance can be especially useful to developing countries or countries new to merger control. What experiences have there been in this type of co-operation? What can be done to enhance it in the future?*

Documentation reproduced from prior roundtable

12. The following documents relating to the prior roundtable will be reproduced in a Working Document [CCNM/GF/COMP/WD(2001)1]:

- Issues paper by the Secretariat DAFFE/CLP/WP3(2001)5
- Country submissions for the discussion

Canada	DAFFE/CLP/WP3/WD(2001)20
Czech Republic	DAFFE/CLP/WP3/WD(2001)21
European Commission	DAFFE/CLP/WP3/WD(2001)25
Germany	DAFFE/CLP/WP3/WD(2001)19
Norway	DAFFE/CLP/WP3/WD(2001)22
United States	DAFFE/CLP/WP3/WD(2001)23

- Aide Memoire of the discussion DAFFE/CLP/WP3/M(2001)2/ANN2/REV1

Unclassified **CCNM/GF/COMP/WD(2001)1**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **18-Sep-2001**

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CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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OECD Global Forum on Competition

MERGER ENFORCEMENT AND INTERNATIONAL CO-OPERATION

-- Documentation of WP3 Roundtable (May 2001) --

This document contains the documentation of a Roundtable organised in May 2001 within Working Party No. 3 of the Committee on Competition Law and Policy. It is submitted in view of the discussion concerning Merger Review that will take place at the Global Forum on Competition on 18 October 2001. Background information and suggested issues FOR DISCUSSION are circulated separately as CCNM/GF/COMP(2001)1.

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English text only

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I. ISSUES PAPER BY THE SECRETARIAT

1. The "merger wave" of the mid and late 1990s has been well documented.[1] In the United States, for example, the dollar value of all mergers notified to the competition agencies increased eleven-fold from 1991 to 1999.[2] The European Commission reported that the number of mergers notified to the Commission increased five-fold between 1993 and 1999.[3] The total value of all merger and acquisition activity world-wide was reported at $3.4 trillion in 1999.[4] It is widely perceived that the incidence of transnational (or "cross-border") mergers has increased at a corresponding rate.[5] As trade barriers have fallen, the geographic scope of markets has expanded. Enterprises have expanded correspondingly, often by merger and acquisition, in an effort to serve these broader markets.

2. Because transnational mergers may be subject to the competition laws of several countries, their increasing number has created new issues affecting both the parties to such mergers and national competition agencies.[6] Close to 100 countries now have competition laws and of these, 60 or so employ some form of merger control. These laws are each unique, procedurally if not substantively. The parties to such mergers may have to notify, and be subject to investigations by, the competition agencies of at least two and perhaps many competition agencies simultaneously. Apart from the financial burdens and delays associated with such multiple reviews, the merging parties run a risk of being subject to inconsistent and sometimes conflicting results in different countries. The competition agencies, for their part, face equally difficult conditions in such mergers. One or both of the merging companies may be foreign; the assets or operations that impact the domestic market may be located elsewhere; important information relevant to the competition analysis may, for jurisdictional reasons, not be accessible to the domestic agency; two agencies investigating a transaction, in ignorance of each other's involvement, may be working at cross purposes, or at a minimum may be duplicating their efforts unnecessarily.

3. The benefits of international co-operation among competition agencies in such situations are obvious, and there has been dramatic growth in such co-operation in past few years. This roundtable discussion will focus on the practical aspects of international co-operation in investigating transnational mergers. It is intended to permit the delegates to share their experiences in such cases, perhaps resulting in progress toward developing best practices in international co-operation. The following discussion in this note presents some issues relevant to the topic. Suggested subjects for discussion are presented in the form of questions at the end of each section.

1. Types of mergers and relevant issues benefiting from co-operation

4. If as many as half of all mergers have an international dimension of some kind, only a small fraction of those have been the subject of international co-operation, beyond the usual notifications under the 1995 Recommendation or applicable bilateral co-operation agreements. It could be useful to gain a better understanding of the characteristics of merger transactions that are likely to be the subject of active co-operation among competition agencies. In general, horizontal mergers attract the scrutiny of competition officials more often than any other type. There is no reason to think that mergers having an international scope would be different. It is probably true, however, that many international mergers are market extension mergers, which means that the parties do not compete directly in a given national market. Such mergers are conglomerate in character, which typically do not trouble competition authorities unless they involve potential competition. Potential competition could, in fact, be relatively more important in large, international merger transactions. That analysis, which involves both an assessment of entry barriers in the target market and of the relative positions of large players outside the market, could lend itself to co-operation among interested competition agencies, each with relatively better access to some portions of the relevant information.

5. Among horizontal transnational mergers, there could be two types: those in which the relevant geographic market is world-wide, or at least sufficiently big to encompass two or more countries, and those involving two or more discrete national markets (or regional markets within two or more countries). An example of the former is large passenger jet aircraft (*Boeing/McDonnell Douglas*), and of the latter, soft drinks (*Coca-Cola/Cadbury Schweppes*). The character and scope of international co-operation could be different in those two situations. Where the national competition agencies are each dealing with the same market, the opportunity for co-operation would seem to be greater, to include fact gathering, analysis and remedy, if any. There could be useful co-operation in the case of national markets as well, however, especially with respect to remedies, discussed further below.[7]

6. Co-operation between competition agencies could be fruitful on any of several issues. Experience to date suggests that market definition, assessment of competitive effects and remedies have most often been the subject of co-operation or exchange of information.[8] Market definition was the subject of discussions between the U.S. FTC and DG Competition in the *Boeing/McDonnell Douglas* case, in which both agencies reached the conclusion that the relevant geographic market was "large commercial jet aircraft."[9] An example of a merger involving co-operation in assessment of competitive effects was the *Holnam/Lafarge* case, involving merger of two large cement producers. The relevant geographic market extended from Vancouver, Canada to Seattle, Washington. The U.S. and Canadian agencies worked together closely, having received a comprehensive waiver from the merging parties that permitted them to do so, to accurately assess the likely affects of the transaction and to fashion effective relief.[10]

7. Co-operation in the remedy phase has been especially fruitful. The benefits of co-ordination in this area are manifest in situations where the merger in question has anticompetitive effects in more than one country. A divestiture of assets in one country could eliminate the harm not only in that country but in others where those assets operate on the market. Conversely, remedies imposed in the absence of consultations with other affected countries could work at cross purposes, fixing the problem in one country and exacerbating it in another. There have been many examples of successful international co-operation in the remedy phase of merger cases in recent years. The *Federal Mogul/ T&N* transaction, which required the close co-operation of authorities in the U.S., UK, France, Germany and Italy on the appropriate relief is such a well-known case.[11] The U.S. and the EC worked closely together on the remedy in the *WorldCom/MCI* case,[12] and there have been several others.

8. The possibility of international co-operation exists, of course, even when only one country has competitive concerns about a merger. That is, the competition agency in the country where there may be adverse competitive effects might find it helpful to contact another country for assistance in gathering relevant information that exists in the requested country. Or, a given merger might not itself have any transnational effects, but the competition agency might find it useful to seek assistance from another country in analysing the transaction, or in providing general information about the sector or market involved. Instances of such co-operation are less well documented, and it is not clear how often such exchanges take place. There would seem to be opportunity for enhancement of this type of co-operation, as well as the more familiar kind where all the co-operating countries have a stake in the outcome.

9. It is often said that substantive convergence in merger control is problematic in the short run, and that more immediate progress can be achieved on the procedural side, including through the enhancement of international co-operation. Substance and procedure are not wholly separate, however. If the substance of the merger control laws of countries differ significantly, it would be more difficult for those countries to co-operate effectively. There has been, in fact, significant convergence in the substance of merger analysis across countries.[13] This convergence may be fostering more co-operation, or in turn it could be the result of that co-operation. In any case, it would seem that progress in international co-operation in merger control must parallel, to some extent, continuing convergence in substance as well.

Possible issues for discussion:

- *What are the current trends in transnational mergers? Are they growing in number relative to the total number of mergers proposed, as the globalisation process continues?*
- *Describe instances of particularly successful international co-operation. What were the characteristics of such cases that lent themselves to such an effort?*
- *Co-operation in the remedy phase has been the most common and most successful of all types of co-operation so far. Can co-operation in the analysis phase be enhanced? Is there a need to do so?*
- *How frequently do countries co-operate in situations in which only one country has concerns about a transaction? Is there opportunity for expanding this form of co-operation?*
- *What is the relationship between substantive convergence and international co-operation in merger control?*

2. The Methodology of International Co-operation

9. The first step in the co-operative process may be the exchange of formal notifications pursuant to the 1995 Council Recommendation on Co-operation or applicable bilateral co-operation agreements, which could alert the relevant agencies of the transnational character of the transaction. Or, in the case of large, high profile mergers that are reported in the business and financial press, the dialogue could start even before the premerger notifications are made to the agencies.[14] In any case, the realisation that a merger may be scrutinised by another country can often come soon after an agency becomes aware of the transaction. How quickly this occurs may be a function of the extent to which the competition agencies in the two countries have worked together previously, and have developed ongoing working relationships.

10. The dialogue that follows may depend substantially on the degree to which the merging parties have granted the relevant competition agencies the authority to exchange confidential information, a topic that is discussed further below. The laws of virtually every country forbid the disclosure of all non-public information that a competition agency acquires in the course of a merger investigation. Competition agencies strictly respect those rules. They do not consider themselves constrained, however, from exchanging "deliberative process" information – analysis and conclusions about market definition or competitive effects, for example – that is non-public but does not contain business confidential information. They may also share information on the investigative process, such as the timing, and what documents and information have been requested.[15]

11. Competition officials have described the co-operation process as an informal, collaborative dialogue, usually between the case handlers in the participating agencies.[16] On occasion there is more formal co-operation, and this is true especially between the EC and U.S. agencies. Thus, for example, in the *MCI/WorldCom* case DG Competition and the US DOJ engaged in "joint negotiations" with the parties that led to a divestiture of assets that satisfied both countries.[17] In 1999 the EC and the U.S. extended their formal co-operation in two ways. They created a joint EU/U.S. Working Group, with the mandate of undertaking studies of enhancing the implementation of effective remedies in merger cases and of the possibilities for further convergence in substantive merger analysis. They also entered into an agreement on Administrative Arrangements on Attendance, which formalised the practice of permitting U.S. officials to attend oral hearings before the Commission as observers in appropriate cases, and in a reciprocal manner, permitting DG Competition officials to attend meetings between the merging parties and senior U.S. enforcement officials prior to the final decision by the U.S. agencies on a case.[18]

12. While international co-operation has become more formal and institutionalised, at least as between certain countries, it has not reached the level of formal participation by one country in the

analytical or prosecution phase in another country. Countries continue to conduct their own investigations and reach their own enforcement decisions in every case. It has been suggested in some circles, notably the ICPAC Report, that a logical next step in dealing with transnational mergers is for a form of "work sharing" between interested countries, in which one country that has a lesser interest in a merger would refrain from conducting its own investigation in favour of another country that has a greater interest, and which could reach a conclusion that would take the interests of the forbearing country into account. An even more far reaching process would have one country act formally as the co-ordinator in a given case, undertaking to evaluate the effects of the transaction on a global scale.[19] The report notes that such advanced work sharing is a "distant vision," and is presently subject to significant legal and procedural uncertainties.[20]

Possible Issues for Discussion

- *Describe the co-operation process in one or more cases in which it was successful.*
- *What are the types of information that are most commonly exchanged in co-operation cases? Do agencies have any inhibitions about disclosing their deliberative processes to their fellow competition officials?*
- *What are the prospects for extending co-operation further in the analytical phase? For formalising participation in one another's investigative processes? For ultimately engaging in some form of "work sharing?"*

3. Engaging the Merging Parties in the Co-operation Process – Obtaining Waivers of Confidentiality

13. The constraints on disclosing confidential business information that apply to virtually every national competition agency can substantially inhibit the ability of the agencies to co-operate, even in sharing analyses and conclusions and in the remedy phase. Experience has shown that substantial co-operation among competition agencies is possible in most cases only with the consent of the merging parties. As noted above, there have been several cases in which the international co-operation was highly useful, and in many of these, if not most, the parties consented to some kind of waiver of confidentiality.

14. The business community approaches confidentiality waivers warily. They state several reservations about the practice, among them: that sensitive business information may be disclosed to competitors or to the public; that it could be disclosed to an agency in a country whose competition laws are substantially different from those in the originating country; that it may be disclosed to government agencies other than competition agencies in the receiving country and be used for purposes other than competition enforcement; that it may be disclosed in the course of litigation, or in response to subpoenas in private litigation; that disclosure to another agency would cause the loss of evidentiary privileges that otherwise apply to the information.[21] Notwithstanding the business community's misgivings about the waiver procedure, however, its members have been heard to say that they feel that they are sometimes under undue pressure from competition agencies to grant waivers upon request. They may feel that they cannot refuse, given the power that the agencies have to approve or oppose the transaction under review.

15. Competition officials respond with scepticism about such reservations. They point out that they are regularly entrusted with confidential information provided to them in the course of merger investigations and that they have excellent records in protecting it. They note that there is no record to date of unauthorised leaks or disclosures resulting from international co-operation in merger investigations.[22] Regarding risks that shared information could find its way into other cases or investigations in the receiving country besides the merger investigation at hand, competition officials point out that the merging parties can assess the risk that the information might be relevant to other violations of law in the receiving country before deciding to grant a waiver.[23] For their part, competition officials sometimes express the view that

the business community's reticence about waivers has less to do with concerns about unauthorised downstream disclosure of confidential information and more to do with a desire to hinder the co-operative effort. In a given case, the merging parties may conclude that international co-operation would ultimately harm their chances of getting their deal through in the countries of concern.

16. In any case, confidentiality waivers have been granted, and it seems that the practice is growing. What types of waivers are most common? The practice has had an *ad hoc* nature to date. The parties and the competition agencies agree on the content of the waiver on a case by case basis. Waivers can range from the specific to the general: from, for example, "targeted" waivers to permit the agencies to discuss specific issues, such as remedy, to waivers permitting discussions on all issues, to waivers permitting the exchange of specified information and documents, to "blanket" waivers permitting unrestricted exchange of information and documents. Further, in place of granting waivers permitting exchange of information by the agencies, the parties may agree to provide specified information directly to another country, upon receiving assurances of confidential treatment in the receiving country.[24] The ICPAC Report provides three "model waiver" forms[25] exhibiting waivers of different scope. The forms also contain provisions ensuring that the participating agencies will respect the confidentiality of the information exchanged.

17. In sum, it is clear that ability to exchange most information obtained in merger investigations is severely limited by national laws, and it is likely to remain so for the foreseeable future. It is equally clear that effective international co-operation depends upon the ability to share confidential information, at least for limited purposes, which means that the willingness of the merging parties to grant such permission is critical to the success of a co-operative effort. It can fairly be asked whether the reluctance of the merging parties to grant confidentiality waivers is a significant impediment to international co-operation in merger control, and if so, whether there are means of encouraging a greater willingness by the business community to agree to such waivers.

Possible Issues for Discussion

- *What is the degree of success in persuading the merging parties to grant confidentiality waivers necessary for effective international co-operation? What tactics are most successful in that regard from the perspective of the competition agency?*
- *What types of waivers are most commonly employed?*
- *In negotiations about waivers, what are the reasons given by the parties for refusing to grant them or to restrict their scope? What can be done to alleviate the problems that they raise?*

4. Bilateral Co-operation – the Degree of Activity among Jurisdictions

18. That the United States and the European Commission have developed a close co-operative relationship in the past few years is well known. Robert Pitofsky, Chairman of the US FTC, remarked at the observance of the tenth anniversary of the promulgation of the EC merger regulation:

> In my view, it is hard to imagine how day-to-day co-operation and co-ordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share, on a regular and continuing basis, views and information about particular transactions, co-ordinate the timing of our review process to the extent feasible, and almost always achieve consistent remedies.[26]

For his part, Mario Monti, European Commissioner for Competition Policy, recently noted that the co-operation and positive comity agreements between the EU and the U.S.

> . . . have been a marked success. Our experience with bilateral EU/US co-operation has been that it works very effectively - and particularly so in merger cases, substantially reducing the

> risk of divergent or incoherent rulings. Indeed, Commission staff are in close and daily contact with their counterparts at the Antitrust Division of the US Department of Justice and Federal Trade Commission.[27]

19. Most of the notable merger cases involving international co-operation have involved the U.S. and the EC, but some have involved one or more other countries. The *Federal Mogul/ T&N* merger, noted above, involved several countries, including the U.S., UK, French, Germany and Italy. The U.S. and Canada work together on mergers that affect those two countries. Other cases have been noted that involved bilateral co-operation on an *ad hoc* basis. There were communications between the UK and Canada regarding the *Air Canada/Canadian Airlines* transaction, for example, which had an effect on UK/Canadian routes.[28] There exist, of course, many co-operation agreements between national competition agencies, but until the very recent agreement between Denmark, Iceland and Norway, discussed below, none extended to permitting the exchange of business confidential information obtained in the course of merger investigations.

20. Co-operation between the EC and the EU Member States is formalised in the EU Merger Regulation. The Commission forwards copies of merger notifications to the competition authorities of Member States; the Commission is required to maintain "close and constant liaison" with competition authorities of Member States in its merger review process; and an Advisory Committee composed of representatives of Member States consults with the Commission before it decides on an enforcement action.[29] Of course, the one-stop shop feature of the EU law ensures that the Commission and a Member State will not both formally review the same merger.

21. There are not many documented cases of formal co-operation between EU Member States on mergers investigated at the national level, but the competition agencies in that region do maintain close, informal relationships.[30] In 1997, France, Germany and the UK jointly adopted a merger notification form that the parties to a merger that would be notified in any two of those countries could elect to use. In the initial period following adoption of the form it was not widely used, however. Most recently, on 16 March 2001 the countries of Denmark, Iceland and Norway entered into an "Agreement . . . Regarding Co-operation in Competition Cases," which includes potentially significant and innovative provisions permitting the exchange of confidential information, including that relating to merger investigations. The relevant provisions are as follows:

> Article IV
> The exchange of confidential information
>
> 1. The parties agree that it is in their common interest to exchange confidential information. It is a condition for the competitive authorities' submission of confidential information that such information:
> a) is subject to a duty of confidentiality in the competitive authority that receives the information that is at least equal to that of the competitive authority that provides the confidential information, and
> b) may exclusively be used for the purposes stipulated in this agreement, and
> c) may only be passed on by the competitive authority that receives the information if it has obtained in advance the express consent of the competitive authority that supplied the information, and that it is only used for the purpose covered by such consent.[31]

The agreement provides that new contracting parties (countries) may join.[32] While the laws of most countries forbid the exchange of business confidential information, the competition laws of Denmark,[33] the Netherlands[34] and Norway[35] permit it under certain circumstances, even in the absence of a bilateral agreement.

22. In general, it is clear that the EC/U.S. co-operation in merger control has been more comprehensive than any other bilateral arrangement to date. Some reasons for this are obvious. The two jurisdictions are the largest; mergers that have cross border effects are likely to have effects in the U.S. and the EU, if only because of their size. Also, as noted above, there has been significant substantive convergence between the two jurisdictions in merger analysis, which facilitates the co-operative effort. And over time the staffs in the two agencies have become increasingly comfortable in their co-operative relationship.

23. It could be asked whether there are other, less obvious reasons. In particular, could these two jurisdictions be informally assuming the role of joint arbiter in at least certain types of transnational mergers, to the extent that other countries do not find it necessary to intervene? In other words, has the arrangement evolved into an informal form of "work sharing," like that advocated in the ICPAC Report? Such a role could be more likely in cases involving world (or at least regional) markets, in which the effect is mostly the same in all affected countries. (Interestingly, it would seem that the archetypal case of that sort was *Boeing/McDonnell Douglas*, which involved a world market, in which the EC and the U.S. did not agree on the competitive effects. The remedy ultimately imposed by the EC, however, did not interfere with consummation of the transaction.) Such cases are probably not numerous, however. In any event, the question arises as to whether there are opportunities for bilateral co-operation among other countries that are not being pursued, and if so, how can those opportunities be developed further?

Possible Issues for Discussion

- *What are the aspects of the EC/U.S relationship that contribute to the success of the co-operation between these two jurisdictions? If something more than their size is involved, how can these aspects be extended to other co-operation arrangements to enhance their effectiveness?*
- *What are the ramifications of the new agreement between Denmark, Norway and Iceland, permitting the exchange of confidential information in merger (and other) cases? Is the agreement, or others like it, likely to be extended to other countries in the near future?*

NOTES

1 *See*, OECD Journal of Competition Law and Policy: Vol. 3, No. 1, March 2001; Vol. 2 No. 1, March 2000; Vol. 1 No. 1, February 1999.

2 Valentine, Merger Enforcement: Multijurisdictional Review and Restructuring Remedies, remarks before the International Bar Association, Santiago, Chile, March 24, 2000, available at <http://www.ftc.gov/speeches/other/dvmergerenforcement.htm.

3 European Commission, XXIXth Report on Competition Policy, 1999, at 78.

4 Valentine, *supra.*

5 The phenomenon is difficult to quantify, however. Anecdotal evidence abounds. Thus, for example, the UK Office of Fair Trading reported that within a six month period in 1999, of a total of 115 mergers notified to the UK authorities, 21 were also notified to other countries, and of these 21, 7 were notified to more than two countries. Bridgeman, *Recent Developments in Co-operation Between National Competition Authorities*, remarks to Finsbury Limited, 5 October 2000, available at <http://www.oft.gov.uk/html/rsearch/sp-arch/spe16-00.htm>. The U.S. Federal Trade Commission reported that in the first ten months of fiscal year 1999, 38 merger investigations at the FTC progressed to the intensive, "second request" stage. Twenty-one of the 38 were notified to foreign governments pursuant to the 1995 OECD Recommendation on International Co-operation, and of the 21, 12 later involved "substantial" discussions with foreign authorities. Robert Pitofsky, Chairman of the USFTC, has been quoted as saying that fully 50% of the mergers now considered by the FTC have an impact on consumers of more than one country (ICPAC Report at 47).

Interestingly, however, information from the UNCTAD cross-border M&A database shows that cross-border M&As as a percentage of total value and number of deals of all M&As worldwide increased only relatively slightly from 1987 to 1999, from 20% to 25% in number of deals, and from 25% to 30% in total value. UNCTAD, World Investment Report 2000, at 107.

6 *See*, Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, 2000 ("ICPAC Report") chapters 2 and 3.

7 Some types of cases are hybrids in this respect. The relevant markets technically may be no larger than national because of regulatory barriers imposed by governments, but in other respects the markets resemble world markets, with the relevant product capable of being freely supplied from abroad. *See, e.g., In the Matter of SNIA S.p.A., a corporation*, FTC Dkt. No. C-3889, Decision and Order, Aug. 6, 1999, *available at* <http://www.ftc.gov/os/1999/9908/c3889d%26o.htm>. The merger involved two manufacturers of heart lung machines, one based in Italy and one based in the UK. National regulatory barriers effectively restricted the relevant markets to national markets, but the proposed merger had similar effects in both the U.S. and the UK. The U.S. FTC and the UK OFT co-operated closely in devising a remedy that solved the problem in both countries. Parker, *Global Merger Enforcement*, remarks before the International Bar Association, 1999, available at <http://www.ftc.gov/speeches/other/barcelona.htm> .

8 *See*, Parisi, *Enforcement Co-operation Among Antitrust Authorities*, remarks before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law, London, England, 1999,

available at <http://www.ftc.gov/speeches/other/ibc99059911update.htm> ; Commission Report to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the Government of the United States of America Regarding the Application of their Competition Laws, 1999, at 3, available at <http://europa.eu.int/eur-lex/en/com/rpt/2000/com2000_0618en01.pdf>.

9 Commission Report to the Council and the European Parliament on the Application of the Agreement Between the European Communities and the United States of America Regarding the Application of their Competition Laws, for the year 1998, available at <http://europa.eu.int/comm/competition/international/bilateral/usa/1998_comm_report_app_comp_law_en.pdf>, at 3.

10 See, Valentine, *Cross Border Canada/US Co-operation in Investigations and Enforcement Actions*, remarks before the Canada/U.S. Law Institute, Case Western Reserve University School of Law, 2000, available at <http://www.ftc.gov/speeches/other/dvcrossborder.htm>.

11 *See*, Parker, *supra.*

12 1998 European Commission Report on the EC/U.S. Co-operation Agreement, *supra* at 3.

13 "There has been remarkable convergence in substance between the EC and the U.S. in merger review in the last 10 years." Pitofsky, *EU and U.S. Approaches to International Mergers-- Views from the U.S. Federal Trade Commission*, remarks before the EC Merger Control 10th Anniversary Conference, Brussels, Belgium, 2000 available at <http://www.ftc.gov/speeches/pitofsky/pitintermergers.htm>.

14 *See*, Parisi, *supra.*

15 *See*, Parisi, *supra*; Valentine, *Cross Border Canada/US Co-operation in Investigations and Enforcement Actions, supra.*

16 *See*, *e.g.*, 1999 Report by the European Commission on the EC/U.S. Co-operation Agreement, *supra*, at 3: There is "close daily contact between case teams" in the two agencies.

17 1998 Report by the European Commission on the EC/U.S. Co-operation Agreement, *supra* at 3.

18 1999 Report by the European Commission on the EC/U.S. Co-operation Agreement, *supra* at 5-6; Stark, *Improving Bilateral Co-operation*, remarks before a Conference on Competition Policy in the Global Trading System, Washington, D.C., 2000, available at <http://www.usdoj.gov/atr/public/speeches/5075.htm>.

19 ICPAC Report, at 76-82.

20 In a joint response to the ICPAC Report, ICC and BIAC supported the concept of work sharing in transnational merger cases, but expressed doubt that countries would be willing to relinquish sufficient control in such cases to permit the concept to work. *ICC/BIAC Comments on Report of the U.S. International Competition Policy Advisory Committee (ICPAC)*, 2000, available at <http://www.iccwbo.org/home/statements_rules/statements/2000/report_icpac.asp> .

21 *See, ICC recommendations to the International Competition Policy Advisory Committee (ICAPAC) on exchange of confidential information between competition authorities in the merger context*, 1999, available at <http://www.iccwbo.org/home/statements_rules/statements/1999/icpac_confidential_info.asp>; ICC/BIAC joint report to ICPAC, *supra*.

22 *See, e.g.*, ICPAC Report at 67-68.

23 Parisi, *supra.*

24 ICC/BIAC prefer this approach. "This would allow companies to make any explanations of the information necessary and allow them more control over sensitive information." ICC/BIAC report to ICPAC, *supra.*

25 Annex 2-D.

26 Pitofsky, *supra*.

27 Monti, *The EU Views on Global Competition Forum*, remarks before the ABA meetings, Washington, D.C., 2001, available at <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/147|0|RAPID&lg=EN>.

28 Bridgeman, *supra*. *See also*, Jones, *Mergers and Competition in a Global Environment*, remarks before the Victorian Commonwealth Executive Forum, Melbourne, Australia, 2000, available at <http://www.accc.gov.au/speeches/fs-speeches.htm>: The proposed acquisition by BHP of New Zealand Steel had an effect in the Australian market.

29 EC Merger Regulation, Article 19.

30 *See*, Bridgeman, *supra.*

31 Available on the websites of both the Danish and the Norwegian competition authorities, at <http://www.ks.dk/>, and < http://www.konkurransetilsynet.no/velkommen.html>.

32 Article VI.

33 Section 18a.

34 Article 91.

35 Section 1-8. The Netherlands law also permits such exchanges, pursuant to which Denmark and the Netherlands have already exchanged information in a cartel investigation.

II. AIDE MEMOIRE OF THE DISCUSSION ON INTERNATIONAL CO-OPERATION IN INVESTIGATIONS OF TRANSNATIONAL MERGERS

Introduction

1. The Chairman opened the roundtable by stating that the discussion would be organised on a thematic basis, employing the notes submitted by **Australia**, **Canada**, the **Czech Republic**, the **European Commission**, **Germany**, **Norway** (with the collaboration of **Denmark**, **Finland** and **Sweden**) and the **United States**. **BIAC** also participated in the roundtable discussion.

2. The Secretariat introduced the background note that was prepared for the discussion (DAFFE/CLP/WP3(2001)5). The note raises four issues that apply in international co-operation in merger control: the types of mergers most likely to be the subject of co-operation, the methodology of international co-operation, the process for engaging the merging parties in the co-operation process, and developing working relationships with other competition agencies. Transnational mergers – mergers that have effects in more than one country – could be classified into two categories: 1) those in which the relevant market is world-wide or regional, that is, larger than a national market, and 2) those that have different effects in different countries. The second type is probably more common. Countries also co-operate in situations where only one country is investigating a merger. The investigating country may request the assistance of another country in providing information about the market or sector in question, or the co-operating agencies may exchange information about their experiences in certain types of investigations.

3. The note points out that co-operation is usually conducted informally between case handlers, using the telephone or email. Competition agencies in almost every country are constrained by their laws from disclosing information obtained in the course of a merger investigation, but they often exchange information about the deliberative process – market definition and competitive effects, for example, as well as information about possible remedies. Effective co-operation requires the consent of the merging parties to exchanges of confidential information between co-operating agencies. It appears that parties are increasingly willing to grant such waivers. It is important that competition agencies foster confidence in the parties that the confidentiality of their business information will not be compromised if a waiver is granted. Finally, the Secretariat note discusses the types of international co-operation arrangements that have developed, noting in particular the close relationship that has developed between the United States and the European Commission.

Timing

4. The Chairman noted that co-ordination of the timing of merger investigations by two or more competition agencies is critical. This seemed to be a common theme in all of the country submissions.

5. **Canada** stated that it often receives notification of a merger well after its counterparts in other countries, including the U.S. and the EC. Early communications with other agencies are important in this regard, so that Canada can co-ordinate its investigation with theirs. In that regard, Canada now requires that parties identify all other countries to which notification has been made in their notification to Canada.

6. **Germany** noted that differing time schedules have posed problems for the Bundeskartellamt to cooperate with other competition authorities in some transnational cases. This was true for example in a

case that involved both Germany and Finland. Under the rules in effect in Germany, notifications may be given later than they are made to other countries. At a recent meeting of the European Competition Authorities (ECA), Germany proposed that there be established an internet site that would facilitate the exchange of information about notifications.

7. The Chairman asked for further information about the ECA. The **Netherlands** explained that the organisation is an association of European competition authorities. Its first meeting was held in April 2001 in Amsterdam. The next one is scheduled for September in Ireland. There are two working groups in the ECA, one on leniency and one on multi-jurisdictional mergers. In the mergers working group there was a discussion of improving contacts between competition authorities, as noted by Germany, and on developing a common notification form. The form developed in 1997 by France, Germany and the U.K. has not been used by merging parties, principally because the systems of the three countries are substantially divergent. It is hoped that there will be convergence in the future, based on the EC merger regulation.

8. To facilitate contacts between competition agencies in transnational mergers the ECA mergers working group proposed: 1) that countries appoint contact persons for such mergers; 2) countries agree to ask merging parties to name other countries that have been or will be notified; and 3) countries give notice to other ECA countries when they have received merger notifications. It was also agreed that the ECA study further the effects of multi-jurisdictional mergers. A working group was established to study 1) the magnitude of the multi-jurisdictional merger problems, and 2) the extent to which there has been convergence in merger control substance and procedures among ECA countries in recent years. Germany has issued a questionnaire to ECA countries on these issues, and would be willing to share the results with the Working Party.

9. The **United States** asked about the intended use of an Internet site for sharing information about merger notifications. The Netherlands replied that the mergers working group decided not to proceed for the present with the Internet idea, but rather would use normal mail for this purpose.

Methodology of co-operation

10. The Chairman introduced the subject of the means of co-operation, noting that several of the submissions emphasised the importance of frequent, informal communications between co-operating agencies.

11. The **United States** observed that there can be useful exchanges involving information other than company confidential information, which is subject to strict rules against disclosure, absent waiver by the parties. These other types of information include: 1) public information, of which there is a great deal, 2) procedural information, which includes identification of the parties to the merger and the timing of the investigation, and 3) "deliberative process" information. The latter includes disclosure of analysis of market definition, competitive effects and remedies.

12. **Australia** stated that it does not require premerger notification. Parties often seek clearance informally, on a confidential basis, which inhibits Australia's ability to share information with other countries. Also, the ACCC often becomes aware of a transnational merger long after its counterparts in other countries. In this context, informal contacts with other competition agencies are the most effective. Australia also has formal co-operation agreements with New Zealand, Canada and the U.S. In addition to co-operation in specific merger cases, Australia finds general discussions and information exchanges with other countries to be useful. For example, the ACCC conducted some interesting exchanges with other competition authorities on the subject of utility mergers.

13. **Norway** enjoys close co-operative relationships with other Scandinavian countries. There are both formal agreements and informal arrangements that work well among these competition agencies. In the recent *Carlsberg – Pripps/Ringes* merger there was extensive and useful co-operation among Finland, Norway and Sweden, particularly on the subject of market definition. Early in the investigation there was a meeting of representatives of the three agencies at which that topic was discussed. The agencies could not exchange confidential information, however. (Subsequently Norway, Denmark and Iceland entered into a co-operation agreement that would have permitted such an exchange.)

14. **BIAC** commented on the Australia's practice of giving confidential, informal clearances on mergers. Canada too has such a procedure, whereby parties can solicit informal guidance from the Competition Bureau on a proposed merger. As in Australia, this procedure is strictly confidential, and the Bureau may not disclose information that it receives in the process. The availability of such guidance has led the parties in some transnational mergers to come to Canada first, before notifying other countries.

Co-operation outside the transnational merger context

15. The Chairman noted that competition agencies may co-operate in situations other than when two or more agencies are simultaneously investigating a merger. There may be more generalised exchanges of information, as noted previously by Australia, or a country may ask another for information or assistance in a case that only the requesting country is investigating.

16. The **Czech Republic** stated that it found non-case specific exchanges of information very useful. It has sought information from other agencies about markets or sectors, and about certain parties to mergers that it was handling. It has also responded to such requests from other countries.

17. The **European Commission** noted that there is great opportunity for useful information exchanges in that context, as the bulk of mergers examined by most national agencies do not have transnational effects. This type of co-operation is fostered by the long-term development of co-operating relationships between agencies, so that they feel comfortable consulting one another in situations not involving a specific case.

Returning to the timing issue

18. **Sweden** noted that notification rules have a significant impact on the ability of national agencies to enter into co-operation. If some countries require notification and others do not, or if the time at which notification is required varies significantly across countries, they will have begun their inquiries at different times, making co-operation more difficult. The merging parties could facilitate co-operation in this context, by undertaking to notify affected countries at the same time, whether they are required to or not.

19. **BIAC** agreed with Sweden that timing significantly affects the ability and willingness of the parties to co-operate. They are more likely to be willing to grant waivers in situations where the investigation is underway in the countries concerned. In some countries notification cannot be made until a certain event occurs. Parties are less interested in pursuing co-operation in those instances. This situation is another example of how harmonisation of national merger control procedures could enhance the co-operative effort.

20. The **United Kingdom** stated that it, like Australia, had no mandatory merger notification, and thus was sometimes not informed of transnational mergers as early as other countries. This can hinder co-operation when countries are at significantly different places in their review. The U.K. also confirmed that the France/Germany/U.K. common notification form had not been used by merging parties to report their transactions. This was due in part because of differences in the laws of the three countries, but also because the parties, who had discretion to use it, simply chose not to. The U.K. lamented that the business community hadn't made an effort to make the form work, thereby possibly enhancing the opportunity for co-operation.

21. **Italy** stated the view that merging parties do not always want to facilitate co-operation. Sometimes it is in their strategic advantage to obtain sequential decisions on a transnational merger. The *Coca-Cola/Cadbury Schweppes* merger seemed to have been such a transaction. Changing the rules to make co-operation easier may not always bring it about; the parties will also have to support it.

22. The **U.S.** returned to the comment by BIAC to the effect that different "triggers" of notification obligations prevent simultaneous notifications to several countries. Couldn't the parties notify simultaneously all countries in which they were permitted to do so, including countries that had no notification requirements? More generally, is it accurate to say that businesses always have an interest in co-ordinated timing and reviews? Don't they sometimes take advantage of different schedules, even within a single country, where notifications of different agencies are required?

23. **BIAC** agreed that merging parties sometimes prefer not to proceed with all reviews simultaneously, especially in circumstances where it appears that the decision in one agency is likely to be determinative. The parties may wish to try to clear that hurdle first, and if they fail they would then abandon their transaction. Nevertheless, harmonising national procedures would make it easier for the parties to pursue simultaneous review, and they would have more incentive to do so.

Waivers

24. The chairman noted that waivers by the parties of confidentiality restrictions are a critical part of the co-operation process in transnational merger review, and he asked the delegates to address that subject next.

25. The **U.S.** stated that waivers are obviously within the power of the merging parties to grant, and that in recent years they have been more willing to do so, especially in large transnational mergers. There are four benefits to parties from granting wavers: 1) they make it more likely that the investigating countries will reach the same conclusion; 2) they help to avoid conflicting remedies, if remedies are required; 3) they make the investigation process more efficient and ease discovery burdens on the parties; and 4) the agencies will attempt to co-operate anyway, and the parties may as well participate in that process.

26. **Canada** agreed that parties have become more willing to grant waivers in recent years, and also that the agencies can facilitate the process by pointing out to the parties the benefits that they receive from granting waivers. Parties can use the waiver process to their advantage not only by permitting access to information in the possession of another agency, but also by affirmatively providing such information to the requesting agency, including analyses and briefing material. This was done in the *JDS Uniphase/SDL* case investigated by Canada and the U.S.

27. The **U.K.** stated that from its perspective waivers were not needed in every case. They are not necessary, for example, to permit discussion of the analysis of a transaction, such as market definition. Waivers are important in the remedy phase. On another issue, the U.K. noted that it, like some other countries, gives confidential guidance on mergers. The result may be, however, that parties use this procedure as a means of forum shopping, since the results of the consultations are not disclosed.

28. The **EC** confirmed the experience of other countries, that parties have become more willing to grant waivers in transnational merger investigations. Another phenomenon has developed recently – waivers by third parties, such as complainants, to permit discussion of issues that they raise before the agencies. Complainants, in particular, are interested in having their views heard and discussed by all investigating agencies, and the agencies, for their part, wish to verify the complaints with their counterparts in other countries.

29. The **Netherlands** reported that it has had limited experience in co-operating on specific cases, but it has benefited from information exchanges on issues such as market definition and competitive effects. It noted a positive experience in one case, notified to the Netherlands, Germany and Finland, in which there was an issue of control. Initially the Netherlands authorities were told by the parties that definitive documents on this issue did not exist. They contacted the Finnish authority, however, and learned that such documents did exist, and on that same day the parties provided those documents to the Netherlands.

30. **BIAC** noted that the Secretariat paper dealt with almost all issues in a comprehensive manner. BIAC commented on a point made in the paper that parties may sometimes feel "undue pressure" from competition authorities to grant waivers. BIAC felt that occasionally this does happen. It also feels, however, that parties seldom refuse to grant waivers for strategic reasons – reasons associated with a desire to prevent co-operation.

31. **Mexico** has had good experience in international co-operation in mergers, especially with the U.S. It feels that perhaps too much information is considered confidential; the information necessary to conduct the basic competition analysis – definition of markets, market shares, and so forth – should not be confidential, for the most part. This could be an area for fruitful study on an international basis: a general understanding on the types of information that should receive confidential treatment.

32. **Brazil** stated its agreement with Mexico on the confidentiality issue. In Brazil there is a regulation that defines information to be considered confidential, and much that is used in merger analysis, such as market share information, is not so classified.

Structure of merger co-operation

33. The Chairman noted that there are different types of co-operation arrangements – bilateral, multilateral, and so forth. It is recognised that co-operation between U.S. and the EC is considered the most advanced and most successful. He asked for comments from those two jurisdictions on their model.

34. The **EC** noted that there is a long-standing, formal agreement on co-operation between the two jurisdictions, but this agreement is merely the foundation for their relationship. More important is the mutual understanding that the competition agencies have reached through regular, informal contacts on many cases. Through these contacts the agencies have gained an understanding of each other's institutions and procedures. One important aspect in the co-operative effort is collaboration in collecting information – using common definitions, for example. Rendering assistance in gathering information from a source within the other country's jurisdiction is also a valuable part of the relationship.

35. It remains to be seen whether this kind of model, based on mutual understanding gained in the course of many investigations, can be translated into a global system. There are some aspects to the U.S. – EC relationship that are unique, principally the large number of cases that affect both jurisdictions. Other jurisdictions will not have the need for such frequent and long standing contacts. On the other hand, the continuing growth in world-wide trade may result in a need for closer co-operation between other countries as well.

36. The **U.S.** agreed with the EC that the close and constant contacts between the two jurisdictions are the basis for their confidence in one another and the success of the arrangement. In this regard the structure of the U.S. – EC relationship – the 1991 co-operation agreement – is less important than the practice. There have been other formal aspects to the arrangement that have been added, however. These include the 1998 positive comity agreement, the arrangement whereby case handlers from one agency are permitted to attend hearings and meetings held by the other, and the establishment of a joint working group that has been studying the issue of remedies in merger cases and will soon begin the study of oligopoly or joint dominance.

37. The U.S. stressed that the relationship centers on informal contacts between case handlers – those who are working on the investigation and are familiar with the facts and the analysis. An example of how the conversations benefited both agencies was in two recent telecommunications mergers, *WorldCom – MCI and WorldCom/MCI – Sprint.* The information exchanges facilitated quicker learning by both sides in these highly technical markets.

38. The Chairman noted that the U.S. has a much more comprehensive formal co-operation agreement with Australia than it does with the EC. Is this evidence that the structure of a co-operative relationship – the formal agreement – is less important than the practice?

39. The **U.S.** replied that it does, but it also noted that while the U.S. – Australia agreement does permit the exchange of some confidential information it does not extend to information obtained in the course of a merger investigation. **Australia** agreed that the agreement is applicable more to non-merger cases.

40. The Chairman invited Norway, Denmark and Iceland to comment on the effect of their recent information sharing agreement in merger investigations. They replied that the agreement is quite new, and hasn't been used yet in the merger context. **Sweden** noted that the Scandinavian countries are increasingly being integrated into a single market, which is likely to cause an increase in the number of mergers that will affect more than one country. Sweden cannot join the Nordic co-operation agreement without amending its laws, but it nevertheless expects co-operation in the region to grow even outside the formal agreement. For example, those countries treat less information as confidential than other countries do, which will enhance their ability to co-operate in the future.

41. The Secretariat noted that the three-country Nordic agreement is indeed quite new, with little or no experience having been gained under it, but it has the potential for significant impact as the first agreement that permits exchanges of confidential information in a merger investigation without the permission of the parties. The Chairman commented on Sweden's intervention – that it expected to deepen its co-operative efforts with its neighbours despite not being permitted under its laws to join the formal agreement – as evidence that structure is less important than practice; that co-operation can be enhanced informally when countries have the will and the opportunity to do so.

Case discussions

42. The Chairman stated that the roundtable would conclude with brief discussions of a few specific cases on which there had been extensive co-operation, so that there might be a further understanding of how the principles of co-operation that had been outlined earlier were applied in practice.

43. The first case discussed was *Air Liquide/Air Products – BOC*, which was investigated by the U.S. and the EC. The **U.S.** stated that the merger involved parties based in the U.S., France and the UK. The relevant geographic markets were regional, and the merger affected various markets differently. The EC approved the merger, but the effects in the several U.S. markets were considered to be more severe, and the objections by the U.S. FTC ultimately caused the parties to abandon the agreement. Despite there having been different outcomes in the two jurisdictions, however, the U.S. considered that there had been significant co-operation between them, particularly on the subject of market definition. There were also discussions of remedies, until the merger was abandoned.

44. The **EC** confirmed that co-operation had been good in this case. The EC also discussed two common misperceptions in this area of multinational review of mergers: 1) That countries sometimes "compete" in negotiating remedies – that after one country obtains a satisfactory remedy the second will try to obtain a little more. This is not the case; countries merely try to tailor the remedies they seek to the perceived effects in their markets. When the effects are different, the remedies necessary to correct them will also be different. 2) That countries tend to be more favourable in their review of transnational mergers to the parties headquartered in the reviewing country. Again, the EC stressed that the reviews by national agencies are impartial, and that indeed, depending on the results of the investigation, an agency may impose stricter remedies on its national enterprises than on foreign ones.

45. The proposed merger of the *London Stock Exchange and Deutsche Börse AG* involved the **UK** and the **German** competition agencies. While the merger was ultimately abandoned for reasons other than competition issues, there was significant co-operation between the OFT and the Bundeskartellamt before the parties terminated the agreement. Their discussions centred on the topic of market definition, which involved new and difficult issues for both agencies. Representatives of the two agencies met in Bonn on one occasion to discuss the issue. While the termination of the agreement ended the co-operative effort in this case, the agencies felt that they had developed good relationships that would be useful in future cases.

46. The Chairman asked the countries involved in the investigation of the *Carlsberg – Pripps/Ringes* merger, which had been noted earlier in the discussion, to describe their co-operation. **Norway** stated that the merger was notified simultaneously to four countries – Norway, Finland, Denmark and Sweden. The fact that the notification was simultaneous was helpful in permitting the countries to co-ordinate their investigations at an early stage. Most of the discussions among the co-operating agencies had to do with market definition. To this end there was a meeting in Stockholm of representatives from Norway, Sweden and Finland. Each gained a good understanding of the others' markets as a result of these discussions. No confidential information was exchanged, however. A principal lesson learned from this case was that timing is important in a successful co-operative effort, and it is necessary to begin the co-operation as early as possible.

47. **Finland** noted that the possibility existed for it to join the three-country Nordic agreement as some point in the future. This case pointed out, however, that co-operation can be useful even without the exchange of confidential information.

48. **Sweden** returned to the important issue of timing. Most significant transnational mergers are announced publicly soon after the agreement is reached. This permits the affected countries to begin discussions with one another even before the merger is notified to all of them. Exchange of background

information about the parties and the affected markets would be highly useful at this early stage of the investigation.

49. The last case discussed was *Alcoa – Reynolds*, which involved **Australia, Canada, the EC and the U.S.** There were bilateral discussions among the four countries, especially in the remedy phase. In the end, however, the remedies adopted by the U.S. and the EC proved sufficient for Australia and Canada, which therefore did not undertake separate enforcement actions.

50. The Chairman summarised some principal themes that were developed in the discussion. Timing is important to successful international co-operation in merger control. Co-operating competition agencies should begin their discussions as early as possible in the process. While the exchange of confidential information is sometimes important, there can be meaningful co-operation without it, as countries can exchange and discuss publicly available information as well as their theories and conclusions, for example about market definition and remedies. Finally, the roundtable established that while the structure of co-operation – bilateral and multilateral international agreements – can be useful in establishing the framework for co-operation, far more important is the development of a productive working relationship between competition agencies, which is nurtured by frequent and ongoing informal contacts between professionals at all levels in the agencies.

III. COUNTRY SUBMMISSIONS AT THE ROUNDTABLE

CANADA

1. The growth in both transnational mergers and national merger review systems has raised several important issues for antitrust authorities around the globe, such as information sharing, potential duplication of work and conflicts between competition agencies involved in parallel reviews. Co-operation can help overcome these problems and enhance the effectiveness of enforcement.

2. This paper will focus on the Canadian Competition Bureau's perspective on international co-operation and its experiences with co-operation on the review of transnational mergers. Before discussing the Bureau's experiences and lessons learned, however, the paper will commence with a brief discussion about the similarities and differences of Canada's merger review systems compared to other competition agencies and the resulting implications for co-operation, as well as the co-operation tools currently utilised by Bureau. The paper will end by examining the recommendations in the *Whish Wood Report*, and highlighting those most pertinent from the Bureau's perspective

Comparison of Merger Laws

3. The majority of the Bureau's experience with international co-operation in merger review is with the US Department of Justice (DOJ) and the Federal Trade Commission (FTC), and in more recent years with the DG Competition at the European Commission (EC). The discussion, therefore, will focus on the laws of these two jurisdictions. This is not to say that the Bureau does not co-operate with other agencies; The Bureau has consulted with the Australian Competition and Consumer Commission (ACCC) and others, such as the Mexican, German and UK authorities, on several merger cases.

4. Before examining the different merger laws, it is important to note the distinction between the substantive and procedural aspects of merger review. Substantively, Canada's legislation is very similar to those of the US and the EC (with the exception of efficiencies).[1] Procedurally, however, Canada's merger notification system is significantly different compared to the US and EC systems. As the following discussion illustrates, the lack of convergence on procedures is the greatest hindrance to co-operation.

Substantive Laws

5. From the considerable communication the Bureau has with its US counterparts, it is apparent that there is a high degree of similarity in the practical methodology of merger review in Canada and the US. Though some differences exist in terms of thresholds of concern regarding concentration levels and factual differences between markets, officials from both jurisdictions largely adopt the same approach and take into consideration similar factors when doing the nuts and bolts of merger analysis, such as defining markets and evaluating barriers to entry. These observations also apply largely to the Bureau's experiences with the EC. In the end, officials from the competition authorities in the US, EC and Canada deal with very similar practical considerations and analytical processes which makes co-operation beneficial.

Pre- Notification Laws

6. Canada's merger notification laws are substantially different from that of the US and EC with respect to pre-notification requirements and waiting periods. The EC Form CO and the US Hart Scott Rodino filing provide for initial 30 day waiting periods, compared to the Bureau's 14 calendar day waiting period. As for content, the US and EC's initial filings include more extensive market share information and business documents. The Bureau's long form filing, which has a 42 day waiting period, provides some of this information, although it is still not as extensive as the Form CO or HSR filing and is only used in a small number of cases.[2]

7. The differences in waiting periods and subsequent two phase reviews of the US and EC (i.e. second request or phase II investigation) tend to result in substantial disparities in terms of timing of reviews. These inconsistencies are intensified for the Bureau by the fact the US and EC may receive a notification well ahead of the parties filing in Canada.

8. From the Bureau's perspective, there are two issues regarding notification and timing that can impede co-operation: 1) staggered notifications and 2) the resulting differences in the deadlines for each agency. First, when one regulatory authority is notified weeks or even months before another, this results in an asymmetric and less-than-efficient exchange of information given that one agency's review may be more advanced than that of the other. If all authorities were notified concurrently and with similar information, then discussion of issues would be more meaningful and productive for all authorities involved. Secondly, given the differences in pre-merger notification laws and waiting periods, each competition authority will have different deadlines for their respective reviews. Clearly, this is an obstacle for co-ordinating reviews and potential remedies.

Remedial Phase

9. The extent to which the Bureau can co-ordinate remedies with foreign authorities is an important consideration for co-operation. Due to the relatively smaller size of the Canadian economy compared to those of the US and the European Union, Canada is often faced with mergers that are essentially subsidiary transactions of mergers taking place on a larger scale elsewhere.

10. In cases where a problem is identified by more than one agency that requires remedial action, it is necessary to weigh a number of competing considerations, such as the costs of potentially redundant or conflicting enforcement versus the particularities of the competition interests in Canada. In some cases, a straightforward divestiture effected in the US may remove the competition concern in Canada, while in other cases, there are particular Canadian considerations which may require supplementary remedial action in Canada.

11. Institutional differences between Canada, the U.S. and Europe can also have implications on co-ordinating remedies. The institutional set-up in Canada between the Commissioner of Competition and the Competition Tribunal is unique from the Commission-models of the FTC and EC. Given the distinction in Canada between the investigator and adjudicator, the consent order process in Canada can take more time than the consent order and undertaking processes in the EC and the US, making simultaneous remedies more difficult.

Co-operation Arrangements

12. Co-operation can take place both formally and informally. Although a formal framework is not a prerequisite to co-operation, it can foster communication and co-ordination between competition authorities and is more germane to the use of more advanced co-operation tools such as the exchange of confidential information.

13. The Bureau is actively involved in international initiatives, both bilaterally and multilaterally, to promote co-operation among competition agencies. Important co-operation instruments for the Bureau are the co-operation arrangements with foreign jurisdictions, notably the US, European, Australian and New Zealand competition authorities, which generally resemble the OECD Recommendation.[3] A significant number of notifications under these co-operation arrangements and the OECD Recommendation involve merger matters. Since 1995, almost half of the notifications received and sent by the Bureau related to merger cases.[4]

14. Under these arrangements, neither Party is required to communicate information to the other Party if such communication is prohibited under existing law. Confidentiality provisions in domestic laws relating to the treatment of information provided pursuant to competition investigations continue to pose difficulties for international co-operation. In Canada, the Commissioner of Competition can communicate confidential information otherwise protected under section 29 of the *Competition Act* [5] to foreign authorities if doing so is for the purposes of the "administration or enforcement" of the *Act*.

15. The preceding discussion illustrates that the main barriers to co-operation are the differences in notification filings and timelines, and confidentiality limitations.

Recent mergers reviewed with significant co-operation

16. With the growth of transnational mergers and co-operation arrangements as outlined above, the number of cases involving co-operation between the Bureau and foreign competition agencies rises steadily every year. In addition to the mere increase in the number of shared cases and informal exchanges, the breadth of co-ordination between agencies has also become more significant. Co-operation now begins earlier in the merger review process, involves more detailed discussion of substantive issues, and often follows through to co-ordination at the remedial stage.

17. Though many instances of co-operation have occurred in recent years, the following is a discussion of a few cases involving significant and successful co-operation in the last 2 or 3 years.

18. The Bureau co-operated extensively with the FTC in the review of two mergers in the cement industry: *Lafarge/certain assets of Holnam* (1998) and *Lafarge/Blue Circle* (2000-01). Waivers were granted by the parties in both cases, allowing officials from the FTC and the Bureau to share views on substantive matters such as relevant market definitions, entry conditions and potential remedies. In the Holnam review, co-operation was more focussed on the investigative stage, but in the Blue Circle acquisition there was an unparallel amount of co-operation in all aspects of the review, and especially noteworthy at the remedy stage. In many of the other cases discussed, Canadian concerns were often resolved through remedies in other jurisdictions. The Blue Circle case is an example of the less frequent situation where the remedy sought in Canada will resolve problems in the US where concurrent orders are likely to apply over the same assets.

19. Significant co-operation occurred in the review of two global aluminum mergers - *Alcan/Algroup/Pechiney* and *Alcoa Inc/Reynolds Metals Company* (1999-2000). In light of the

international and regional geographic markets involved, co-operation occurred with respect to both mergers between the EC, US, Canada and Australia and was facilitated by confidentiality waivers. Throughout the review, the Bureau had contact on several occasions with officials from the US DOJ, the EC and ACCC. These consultations allowed the agencies to assess the competitive effects and identify problematic areas of overlap, as well as discuss timing issues. The Bureau and the US DOJ also attended the EC oral hearing as observers in the *Alcoa/Reynolds* matter. Remedies were co-ordinated between the US, EC and ACCC, which addressed any competition concerns in Canada.

20. The *Dow/Union Carbide* merger (1999-2001) in the chemical industry involved extensive tri-lateral co-operation between the US, EC and Canada. The three agencies consulted on market definition, which disclosed common issues due to the international nature of the markets for many of the products of concern and resulted in frequent bilateral and trilateral communications. Confidentiality waivers made it possible for the three agencies to have in-depth discussions regarding analysis of evidence and issues, particularly with respect to market definition and remedies. The Bureau also attended the EC oral hearing in this matter. Discussions regarding remedies led to US and EC resolutions which addressed the competition issues in Canada.

21. The Bureau consulted with the US DOJ in its review of the *Abitibi/Donohue* merger (2000) given the North American dimension of trade in the newsprint products involved. A waiver was provided by the parties, and the agencies contacted each other regularly to update one another on issues, such as timing, theory of the case, and complaints. In the end, the US did not seek a second request, and the Bureau proceeded to obtain a divestiture remedy from the parties. Co-operation was helpful, however, at earlier stages in assessing the merits of the case.

22. The *JDS Uniphase/SDL Inc.* merger (2000) was a particularly successful instance of co-operation for the Bureau, in large part due to the role of the parties. In this case, the parties offered to provide the Bureau with all of the information they provided to the US authorities. This included access to all documentation provided to the US, such as competitive analysis briefing material with respect to product overlap and market definition. This was extremely useful to narrow down the analysis and identify problematic areas in the very complex global fibre optics industry. In addition to the documentation, the oral briefings provided to the Bureau by the parties were similar to the ones provided to the US DOJ. The fact that JDS is a Canadian company was a large factor in the parties' decision to proceed in this fashion, and the ensuing co-operation was beneficial for all involved. In the end, the remedies involved the divestiture of a plant in the UK, which resolved any potential negative impact in Canada.

23. The Bureau's review of the *GE/Honeywell* transaction, the largest industrial merger ever, has not surprisingly involved significant co-operation with the US and EC. Waivers to the relevant competition authorities were provided by the parties as well as from some third parties at an early stage in the review. With multiple international markets to consider, officials from all three agencies have exchanged views and theories regarding the case and have shared documents, such as the DOJ's second request and the EC's Article 6.1 decision, which outlines the rationale for proceeding to a phase two investigation. At the latter stages of the review, case officers from these authorities met face to face in Washington.

24. Co-operation in the investigation of issues regarding the domestic airline industry, though somewhat unique from the cases listed above, is worth mentioning since it illustrates the importance of co-operation on policy issues (vs. case specific issues). While some case-specific discussions occurred between the Bureau and the Office of Fair Trading in the UK and the EC when the *Air Canada/Canadian Airlines* merger (2000) was being considered, more debate has occurred on a policy level with several countries (e.g. Mexico, Sweden, US, Australia and EC) on an ongoing basis since completion of the merger. Though the airline industry has unique circumstances from country to country, at the same time, the competition authorities of these countries are examining the same issues, such as concern over travel

agent overrides, access to slots, or predation of a dominant carrier, which has led to substantive dialogue on a policy level.

25. In addition to these case-specific examples, it is worthwhile noting that co-operation on other matters is very common as well. For example, the Bureau often contacts other foreign authorities to discuss general industry information or previous mergers reviews.

26. The following are some observations or lessons learned from the Bureau's experiences with international co-operation:

> It is important to engage the parties in the co-operation process: Parties are generally willing to provide competition authorities with voluntary waivers to allow the authorities to exchange confidential information, and all of the cases discussed above (with the exception of the airline example) involved waivers from the parties.[6] While the provision of waivers is an obvious instance of the parties role in the co-operation process, this role can go beyond the mere exchange of waivers, as highlighted in the *JDS Uniphase/SDL* case. From Canada's perspective, it is also important to engage the parties at an early stage to ensure they provide the Bureau with their notification filing on a timely basis, concurrently with filings in other jurisdictions.
>
> Early and frequent contact between competition agencies is essential: This point cannot be overemphasized, especially given the different timelines for review of the various authorities. At the moment, the main avenue for the Bureau to overcome the problem of staggered timelines is to keep the lines of communication open and up to date. Notifying other agencies of important case developments and timing considerations is crucial for successful coordination of parallel reviews.
>
> The benefits of coordinating remedies or complementary action can be considerable: Coordination of remedies is very useful for ensuring an effective remedy and for avoiding potential duplication or possible conflicts. Small and medium sized countries are more likely to benefit from remedies in other countries due to the relative size of the respective economies, but a complementary remedy in the smaller jurisdiction is often required. This is not to say that there are no instances where coordination of remedies can benefit the larger jurisdiction, for example the remedies sought by Canada in the *Lafarge/Blue Circle* case will resolve concerns on both sides of the Canada-US border.
>
> Co-operation can be useful on both case-specific and general policy issues: One area where a substantial amount of consultation and discussion occurs between competition authorities is on market definition issues and other factors, such as barriers to entry, involved in analysing markets. This type of debate is relevant on a case-specific and policy level. The discussion of the airline industry is a good example of co-operation and consultation on a policy level.

Recommendations in the Whish Wood Report

27. The discussion above clearly illustrates that two of the factors identified in the *Whish Wood Report* as limiting the scope of co-operation correspond closely to the Bureau's experiences with co-operation. From Canada's perspective, 1) timing and notification procedures and 2) confidentiality rules are the major difficulties for co-operation.

28. These two obstacles require both short and long term solutions. For example, a long term solution for the first obstacle is procedural convergence on time periods for notification and review as the report recommends. In the short term, however, competition agencies and the working group can consider

measures to overcome these problems, for example by ensuring competition agencies are notified by their counterparts as soon as possible regarding parallel reviews.

29. Given the importance of international co-operation in the review of mergers and other competition matters, the Bureau regularly considers measures to improve such co-operation. The following four developments are noteworthy in this respect:

1. In Canada, the notification legislation has been amended to require parties to provide a list of other foreign authorities which have been notified of the proposed transaction and the date of the notification.

2. A Bill has recently been tabled to amend the *Competition Act* which includes, among other things, a framework enabling Canada to enter into mutual legal assistance agreements for non-criminal competition matters with foreign states. For example, such an agreement would allow the Competition Bureau to gather evidence on behalf of a foreign state in merger cases.

3. The Bureau will complete shortly a benchmarking study of the merger review process in Canada. Through interviews with staff, stakeholders, other antitrust agencies and members of the international competition bar, the report will identify "best practices" both in Canada and abroad, in order to ensure that the Canadian merger review process remains efficient, effective, timely and transparent.

Conclusion

30. Given that a certain amount of co-operation already takes place, standardising or simplifying some of these processes, for example the exchange of waivers, is a practical starting point. Addressing the obstacles involved with different notification systems and limitations on document sharing is a reasonable first step, but there are certainly other measures to intensify co-operation between agencies. In the future, the working group could study the feasibility and adequacy of measures for more extensive co-operation, such as work sharing.

NOTES

1 For example, while the US antitrust authorities acknowledge the importance of efficiencies to mergers, Canadian law goes further to explicitly recognize the role of efficiencies as a potentially overriding consideration in determining whether to block a merger (*Competition Act*, section 96). For a fuller analysis of the issue of efficiencies in Canadian merger analysis, please see *The Commissioner of Competition vs. Superior Propane Inc. and ICG Propane Inc.*, [2001] FCA 104.

2 In addition to this short and long form notification filing system, the Bureau has established a unique three part classification service standards policy for the review of proposed mergers. A service standard timeframe is paired with the transaction's complexity category. For a non-complex transaction, the Bureau will conclude its review within 14 days, for a complex transaction, within 10 weeks and for a very complex transaction, within 5 months.

3 The competition chapter in the Canada-Costa Rica Free Trade Agreement also contains a framework for notification, co-operation and consultation.

4 As of April 30, 2001, 202 of 476 notifications were related to merger cases.

5 Section 29 prohibits the communication to any person (except with a Canadian law enforcement agency or for the purposes of the administration or enforcement of the Act) of (1) the identity of any person from whom information was obtained pursuant to the Act; (2) any information obtained by the exercise of compulsory powers under the Act; (3) whether a proposed transaction was pre-notified or any information supplied in respect of a pre-notification; (4) any information obtained from a person requesting an advance ruling certificate.

6 As noted previously, the Commissioner of Competition can exchange confidential information to foreign authorities if doing so is for the purposes of the "administration and enforcement" of the *Act*. As such, the Bureau does not require a waiver from the parties to exchange such information, however other authorities do require a waiver in order for a reciprocal exchange of information with the Bureau.

CZECH REPUBLIC

1. Introduction

1. Globalisation creates an increasing number of competition problems exceeding the national borders. One of the most frequent cases in this respect are cross-border mergers and acquisitions affecting conditions of competition at the supranational or even world-wide markets. Such transactions are usually reviewed by multiple competition authorities. The multiple administrative proceedings conducted by several competition authorities can lead to greater uncertainty of the undertakings because of increased likelihood of the application of different legal standards. Apart from this, the competition authorities are equally in a difficult situation since concentrations affecting the domestic market may be often realised abroad. For these reasons international co-operation between the competition authorities is necessary.

2. Office´s approach to international co-operation

2. The Office for the Protection of Competition of the Czech Republic (hereinafter referred to as „the Office“) supports active co-operation between the competition authorities in dealing with transnational mergers.

3. The Act on the Protection of Competition (hereinafter referred to as „the Act“) is based on the effect principle. The Act therefore applies not only to activities within the Czech Republic but also to actions of undertakings occurred abroad which distort or may distort competition in the territory of the Czech Republic.

4. Practical application of this principle, however, faces the problem of state sovereignty. The biggest issues include in particular (i) finding documents for the decisions, where there is a rule that investigations by a domestic organ of state administration abroad are not allowed and are only possible on the voluntary basis, or on the basis of an international agreement, and (ii) execution of the final decision which can not take place abroad. To overcome those problems it is necessary to conclude international agreements on co-operation in competition law enforcement.

5. The Czech Republic has concluded a number of such agreements, in particular Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, Customs Union Agreement between the Czech Republic and the Slovak Republic, Free Trade Agreement among states of Central and Eastern Europe (CEFTA), Agreement between the Czech Republic and EFTA states, and other bilateral agreements on free trade with Latvia, Lithuania, Estonia, Israel and Turkey.

6. The Office has always been consistent in the above free trade agreements containing competition rules on prohibition agreements restricting competition and abuse of a dominant position corresponding with Articles 81 (1) and 82 of the EC Treaty. All of the agreements also envisage solution of competition rules violation. In case of the Europe Agreement there are **implementing rules** adopted by the EU-Czech Republic Association Council on 30 January 1996. It follows from the provisions of the implementing rules which cases shall be dealt with, which bodies are competent to solve them, according to which principles and how the information provided will be protected. In case of other international agreements no special implementing rules were adopted, but the solution of such cases is possible through direct consultations between competition authorities or through Joint Committees exercising surveillance over the agreements in question.

7. As far as the merger control is concerned Article 7 of the implementing rules entitles the Office with regard to mergers, which fall within Council Regulation No. 4064/89 and have significant impact on the Czech economy to express its view. The European Commission shall give due consideration to that view.

8. In connection with merger control under the Europe Agreement it is worth noting that the Office has jurisdiction to apply the Act on the Protection of Competition even on mergers exceeding a Community dimension within the meaning of Council Regulation No 4064/89 and which thus fall under the Commission´s jurisdiction. In relation to the Czech Republic (and other associated countries) the *one-stop-shop* principle is not applied. This fact may potentially lead to the different decisions adopted by the Office and Commission concerning the same merger. With regard to the necessity of legal certainty of the undertakings it is necessary to limit this danger to the lowest possible extent.

9. The procedure envisaged by the implementing rules for the application of the competition provisions of the Europe Agreement has been applied in the following merger cases:

1. The Office notified European Commission merger between the undertakings *Exxon / Shell.* The reason for the notification was effort to ensure identical assessment of both competition authorities resulting in identical decision about the same merger.

2. Further the Office notified concentration between *South African Breweries /Plze•ský prazdroj*. The reason for the notification was to inform the European Commission about this acquisition.

3. The European Commission notified the Office about the merger between the undertakings *RWA / BayWa*, who planned to use the merger for acquiring a stronger position for entry to the Central and Eastern Markets, in particular in the Czech Republic, the Slovak Republic, Poland, Hungary and Slovenia.

4. Further the European Commission notified the Office concentration between the undertakings *E.ON + Energie Oberösterreich / Jiho•eská Energetika + Jihomoravská Energetika.* In this case the company E.ON (Germany) and the company Energie Oberösterreich (Austria) acquired joint control over the domestic undertakings Jiho•eská energetika and Jihomoravská energetika. The European Commission approved the concentration on 12 February 2001 while the Office received the concentration notification on 23 April 2001. The Office has not adopted decision in this case so far.

10. Nowadays the activities of the Office can be characterised by an **informal co-operation** with experts from foreign competition authorities in solving individual cases. Although these cases do not have itself any transnational effects, the Office considers useful to seek information from another competition authorities. The co-operation concerned in particular information about the market in question, proceedings information or information about the undertakings concerned. Very good co-operation has been developed with German, Spanish, Slovak, Swedish, Dutch, English and French competition authorities. Also the Czech Office has provided information for the Brazilian competition authority concerning beer market definition.

11. As far as the merger control is concerned the informal co-operation has been realised namely in the following cases:

1. In case *Deutsche Steinzeug Cremer & Breur / Lasselberger Holding-International* the Office sought information about experience of the foreign competition authorities with defining the relevant market for veneer and pavement.

2. In case of concentration between undertakings *Linde / Technopolyn* there was a complex case of vertical integration in the field of technical gas. In the case the dominant distributor of gas would acquire sole control over the dominant producer of gas. With regard to the fact that the Office has not dealt with vertical concentration where the undertakings concerned hold so strong position on the relevant markets, it sought experience of the foreign competition authorities with similar cases.

12. The Office has very good experience with the informal co-operation since the foreign competition authorities in all cases provided valuable assistance and information provided was used in drafting of the Office´s decisions.

3. New Act on the Protection of Competition fully aligned with Regulation No. 4064/89

13. Harmonisation of competitive legislations across countries reduces legal uncertainty in cases of transnational mergers and acquisitions. In this regard it is worth noting that the Office has worked out a draft of a new Competition Act whose aim is to achieve full compatibility with the EC competition law. The new Act was approved by the Parliament of the Czech Republic in April 2001 and will enter into force on 1 July 2001.

14. The new Competition Act brings about considerable changes in particular in the field of concentration control that is now fully aligned (both from the substantive and procedural point of view) with Council Regulation No. 4064/89 in the wording of Regulation No. 1310/97. As regards the control of concentrations the new Competition Act contains in particular the following changes:

1. Clarification of the definition of concentration. A precise definition of concentration is one of the basic prerequisites for the effective control of concentrations and for ensuring of legal certainty. Therefore, the definition of concentration contained in the new Competition Act is based on the notion of concentration laid down in Article 3 of Council Regulation No. 4064/89.

2. Introduction of the turnover criterion for the concentration notification. Current criterion for the concentration notification based on the market share of the merging companies will be replaced by turnover threshold of the merging companies achieved for the last accounting period on the Czech or world-wide market. Introduction of the notification obligation based on the precisely defined amounts of turnover will increase legal certainty of the undertakings.

3. Introduction of precise time-limits in the merger control. The new Competition Act includes precise time-limits within which the Office´s decisions must be taken in order to enhance legal certainty of the undertakings.

4. Appraisal of concentrations exclusively on competition principles. The new Competition Act will introduce the criteria for permission of concentrations that will be based on competition principles only, i.e. concentrations will be assessed whether create or strengthen a dominant position as a result of which effective competition would be significantly impeded.

5. Details of concentrations notifications will be laid down by the implementing Decree that shall follow CO form contained in Commission Regulation No 447/98. Stipulation of merger notifications requirements corresponding to the CO form shall reduce costs for the merging parties since they will prepare and present substantially the same information both to the Office and e.g. to the European Commission. Further, harmonisation of information requirements will make easier co-operation between the competition authorities since they will review the same or similar information.

4. Conclusion

15. The Office for the Protection of Competition is well aware of importance of co-operation between the competition authorities. International co-operation is realised in particular with the European Commission on the basis of the implementing rules for the application of Article 64 of the Europe Agreement. According to this rules the Office is entitled to express its view with regard to the mergers assessed by the European Commission and also provides the Commission with information about its own proceedings in cases that are dealt with simultaneously by the Commission. Further, co-operation of the Office with foreign competition authorities consisting of informal consultations and exchange of information is being developed very intensively.

GERMANY

1. Transnational mergers and international co-operation of competition authorities

1. In recent years the number of transnational mergers and thus also the proportion of international cases that had to be subjected to an examination by the Bundeskartellamt before they were put into effect has increased considerably. This development calls for the enhanced co-operation of national competition authorities involved in the examination of mergers. It is not only the joint collection and, as far as this is legally possible, the exchange of information that create scope for a broader perspective, making it easier to establish the economic effects of a transaction, but also discussions with colleagues from other competition authorities about how to evaluate a particular merger project. It allows the economic focus and geographic dimension of a merger to be established faster and more precisely. In addition, there are possibilities to co-operate through co-ordinating the negotiation of obligations. When different obligations are imposed by different authorities, the effect may be amplified or cancelled out. This may be avoided by means of such co-ordination. At this stage of the proceedings, joint action is particularly valuable if a competition authority lacks direct access to a merger that has only been put into effect abroad, but still has strong domestic effects.

2. The Bundeskartellamt has in the past sought closer contacts with foreign authorities in cases with a significant foreign connection, and in turn has accepted similar requests from other countries. In addition, there are an increasing number of day-to-day contacts with other competition authorities abroad. There is thus a clear trend towards more intensive co-operation. In the Bundeskartellamt's view, this trend should be further promoted and extended in order to be able to fully benefit from the advantages described above.

3. A number of cases in which there has been enhanced co-operation between the Bundeskartellamt and other competition authorities will be outlined in the examples below (section 2). From the reports by Rapporteurs and Chairmen of the competent Decision Divisions of the Bundeskartellamt who were responsible in each case, the extent of previous co-operation and factors which appear to make a major contribution to the success of co-operation emerge (section 3). The Bundeskartellamt recently presented proposals for improving international co-operation at the constitutive meeting of the European Association of Competition Authorities (ECA), which will be described briefly in section 4. In our opinion these approaches should also be considered in connection with the question of enhanced co-operation within the OECD.

2. Examples of co-operation between the Bundeskartellamt and other competition authorities

2.1 London Stock Exchange/Deutsche Börse AG

4. In August 2000, Deutsche Börse AG and the London Stock Exchange notified both the Bundeskartellamt and the Office of Fair Trading (OFT) in the UK of their intention to each acquire 50 per cent of iX-international Exchanges, which was to be newly founded. The aim of the new enterprise was to combine securities exchanges in order to gain advantages in the emerging European capital market through the concentration of liquidity. Both the Bundeskartellamt and the OFT were faced with the difficult task of defining product and geographic markets in financial services markets, some of which are extremely complex. The two competition authorities therefore agreed at an early stage to co-operate on this case. The enterprises involved, which were informed about those contacts from the outset, did not express any concerns but even supported the co-operation, probably also because they correctly expected that such a co-operation would accelerate the examination of the case. The enterprises agreed to information being exchanged. The dialogue with OFT colleagues took place mainly by telephone and e-mail. At a meeting in

Bonn, information was collated and the preliminary assessment of the merger discussed. The Bundeskartellamt benefited greatly from this co-operation, in spite of the fact that, as we all know, the merger eventually failed and the application was withdrawn.

2.2 RWE/VEW

5. The merger projects RWE/VWE and Veba/Viag that were notified in late 1999 called for particularly close co-operation. While the Veba/Viag case fell within the European Commission's competency, the RWE/VEW merger had to be examined by the Bundeskartellamt. The economic and competitive focus of both mergers lay in the German energy market. The uniform examination that was thus required was guaranteed by close co-operation between the competition authorities involved. The Bundeskartellamt and the Commission particularly co-ordinated the negotiation of obligations. This was necessary, if only because of the great number of interlocks, some of them mutual, that existed between the two merging parties in the electricity market. Accordingly, at the initiative of the Bundeskartellamt and the Commission, RWE/VEW and Veba/Viag committed themselves, inter alia, to selling their stakes in the eastern German grid enterprise Vereinigte Energiewerke AG (Veag), which together amounted to more than 80 per cent, and in its brown coal supplier, Laubag. This fulfilled one of the conditions for increased domestic competition and promoted the creation of an equally powerful competitor in the form of Veag. The competition authorities' close co-operation thus created the possibility of formulating appropriate conditions for maintaining competition. The mergers were subsequently cleared subject to obligations.

2.3 Covisint

6. Close co-operation was also involved with the US Federal Trade Commission (FTC) in the Covisint case. Covisint is a joint venture of the car manufacturers DaimlerChrysler, Ford, General Motors and Renault/Nissan, which is intended to serve as a joint Internet exchange in e-commerce between enterprises and to provide Internet services for procurement, supply management and product development. With the enterprises' consent, the competition authorities were also able to exchange and discuss confidential information during a number of telephone conferences in the examination of the merger. The FTC, whose proceedings had reached a more advanced stage, negotiated the preconditions for clearance with the enterprises. Basically, changes and amendments to the founding contracts of Covisint were discussed with a view to overcoming competition concerns. The Bundeskartellamt supported those negotiations by providing information from its own investigations. As a result, the outcome of the negotiations also covered the concerns expressed by the Bundeskartellamt so that the competent Decision Divisions did not make any further demands on the enterprises and the merger could be cleared.

7. There were also contacts in this case with the European Commission, the Austrian Ministry of Economics and Labour as well as the Japanese competition authority.

2.4 Oy Transfennica/Finnlines Oyi

8. Oy Transfennica and Finnlines Oyi are two Finnish ferry lines covering both the route between Finland and continental Europe and the route between Finland and the British Isles. Their planned merger was initially only notified to the Finnish competition authority Kilpailuvirastu, which announced entry into the second phase of merger control in a press statement on 11 September 2000. Since the Finnish competition authority assumed that the merger was subject to notification in Germany, too, it pointed this out to the enterprises involved and at the same time contacted the Bundeskartellamt. However, the Bundeskartellamt was notified only on 27 November 2000. In the discussions with the Finnish competition authority, during which non-confidential information was exchanged by telephone, both sides' evaluations of the case were discussed and complemented. As a result, both competition authorities considered the merger to be extremely problematic. While the Bundeskartellamt informed the enterprises beforehand that

the second phase of the examination was to be entered and that the case would probably be considered to be problematic, the Finnish competition authority already imposed restrictive obligations on the merger on account of the advanced stage of the proceedings in Finland. The enterprises subsequently withdrew their application.

2.5 Grundfos/Baxi

9. A further case in which the Bundeskartellamt co-operated with the OFT was the Grundfos/Baxi merger case relating mainly to the market for circulating pumps. The discussions between the two competition authorities showed that there were serious concerns about the merger in the United Kingdom while the German market structure was affected far less. Nevertheless, the market definitions that had been made by the authorities were compared and discussed. Non-confidential information was also exchanged in order to verify the correctness and reliability of the individual evaluations. It was also considered whether to co-ordinate the time limits for the proceedings within the existing legal framework. The enterprises involved subsequently withdrew their notification in this case as well.

2.6 Fresenius/Pharmacia Upjohn

10. The Fresenius/Pharmacia Upjohn merger project was a special case in international co-operation. Since the merger clearly affected not only Germany but many other Member States of the European Union, probably in a similar way, at the same time, the Bundeskartellamt considered whether to refer the case to the Commission under Article 22 (3) of Merger Regulation No. 4064/89. For this purpose the competent Decision Division contacted all the Member States affected by the merger. This was followed by a variety of correspondence exchanging initial evaluations of the case. However, the case was not referred in the end since despite the broad agreement for it at first, it was later only supported by a few Member States. Referral was also prevented because many Member States do not have an obligation to notify and it is difficult to co-ordinate the various time limits. The Bundeskartellamt cleared the case after the enterprises involved had sold a division that was particularly problematic for the competition law evaluation.

3. Evaluation of co-operation

3.1 Forms of previous co-operation

11. The examples described above and experience of international co-operation on other occasions show that co-operation took place mainly during the investigation and evaluation phases. Information exchange during investigations and mutual consultation with regard to questions of market definition appear to be the main advantages of international co-operation. So far, the negotiation of obligations has been co-ordinated on only a few occasions. In the case of extremely different time limits, more extensive co-ordination at that stage of proceedings was sometimes impeded because investigations progressed at different speeds, as the Oy Transfennica/Finnlines Oyi example shows. The benefit that co-operation in negotiating obligations may offer to enterprises and competition authorities is demonstrated by the successful co-ordination of obligations in the RWE/VEW and Veba/Viag cases. The co-operation between the Bundeskartellamt and the Commission enabled appropriate preconditions for clearance to be drafted.

12. In many cases enterprises agreed to an information exchange, thereby considerably extending the scope of co-operation. However, enterprises' resistance to co-operation between competition authorities should not be overlooked. The fact that the projects were notified in the various countries concerned at very different times could be regarded as an indication of this. The fact that it is impossible to co-ordinate time limits may prevent co-operation between authorities.

13. The examples also show that international co-operation does not necessarily have to involve concerns on both sides. In the Grundfos/Baxi case, reciprocal support was given in spite of differing evaluations.

3.2 Factors contributing to the success of co-operation

14. There appear to be various criteria promoting successful co-ordination.

- Usually, co-operation appears to be particularly beneficial to all the parties involved if both sides get in touch with each other at a very early stage. The reason for this might be that investigations are started at the same time and results are thus achieved in parallel. In this way, it is possible to make full use of the advantages of co-operation throughout the entire proceedings.

- It also appears to be important how contacts are made and how they are continued. In the experience of the Bundeskartellamt, a cross-border exchange of ideas is most intensive if contacts are not only in writing but also by telephone or, even better, in personal meetings (example: London Stock Exchange/Deutsche Börse). The use of e-mail as a back-up is becoming increasingly important since it combines the advantages of verbal exchange in the form of informal and quick information with the advantages of written contact (e.g., accuracy of descriptions; reduction of linguistic problems, particularly regarding technical terms).

- However, it is the competent case handlers' willingness and inclination to contact colleagues from abroad which appears to be of particular importance. In cases involving individuals on both sides who had a particularly positive attitude towards an international exchange of ideas, co-operation involved a very informal and frequent exchange of ideas, usually by telephone, and was backed up by e-mail. In such cases, co-operation was felt to be of great benefit and the attitude to it was positive. The resulting personal relationships are valuable as well. These are sometimes maintained even beyond the actual case in hand and can subsequently be used as a permanent contact abroad or can be reactivated easily in any new case of international significance.

15. The present considerations show that a more intensive co-operation that also extends to subsequent examination phases can only be achieved through formal co-operation arrangements to a limited extent. It is also important to introduce an "international culture of co-operation", i.e. including international contacts in daily investigation work on a regular basis. This may be promoted, for example, by explicitly encouraging the international exchange of ideas, by enabling personal international contacts to be made and by promoting language training. Formalising co-operation can support this to some extent. It should be considered, however, that the personal factor contributing to success may even be stifled by too great a degree of formalisation. Wherever formal requests and obligations to provide information take the place of informal, spontaneous contacts, potential for closer co-operation of a kind that is personally pursued by motivated staff may be lost. On the other hand, certain formal requirements could be very useful. The "automatised" provision of information to other competition authorities on notifications received could prompt co-operation and make it possible. Engaging in co-operation even before an expected notification is submitted may counteract the problem of different procedural deadlines.

16. Co-operation is often particularly successful when the undertakings agree to the comprehensive exchange of information. They therefore have to be certain that their business secrets will be protected. Confidence-building measures in the form of assurances that this is indeed the case and through open dealings with one another e.g. through providing information on the co-operation between the authorities at

an early stage, appear to contribute to agreement being given to an exchange of information. Any culture of co-operation should thus also involve the companies concerned to the extent described.

4. Proposals by the Bundeskartellamt presented at the constituent meeting of the European Association of Competition Authorities

17. On the occasion of the constitutive meeting of the ECA held in April of this year, the Bundeskartellamt compiled proposals with a view to simplifying co-operation. In the view of the Bundeskartellamt, realising these ideas could make a valuable contribution to intensifying and extending co-operation. This could also contribute to promoting the culture of international co-operation referred to above, which must remain our goal. In our view the measures outlined could also be of great benefit to the OECD countries. The most important elements of the proposed procedures are thus summed up below.

18. In order to become aware of notifications and to find out who is the desk officer handling a case, a joint Internet exchange could be used to exchange information simply and effectively. That would make it possible for the "automatic" information referred to above to be provided relatively easily. The national competition authorities could very quickly find out about notifications received by other authorities and check whether they were competent to deal with the merger. An exchange of organisation charts and telephone lists was agreed in order to make it easier to take up direct contact with the right person. In addition, waivers could be requested as a matter of routine on notification and the explanation given that the competition authorities are working towards co-operation with one another.

19. At a first co-operation stage, the partner authorities could find out about important developments relating to proceedings and deadlines. Intensified co-operation could also involve co-ordinating the enquiries to be carried out and subsequently exchanging information. In addition, a co-ordinated approach should be taken to negotiating obligations and conditions.

5. Prospects

20. The examples given show that co-operation between competition authorities can be very useful and rewarding. The beginnings of intensive co-operation can be clearly seen and there some examples of its success. At the same time there is still plenty of scope to extend these efforts. The proposals referred to, which were drafted by the Bundeskartellamt on the occasion of the constitutive meeting of the ECA, could offer one approach. In particular, a culture where international co-operation is integrated into day-to-day investigative work as a matter of course is a major factor contributing to the success of intensified co-operation. Developing and promoting such a culture should therefore be a central concern of all competition authorities.

NORWAY

Introduction

1. In the Nordic countries there are relatively close informal ties between the national competition authorities. The Competition Authorities have worked out general guidelines for co-operation. As of April 2001, there is also a formal agreement concerning the exchange of confidential information between Denmark, Iceland and Norway. This agreement is enclosed in Annex 1 of this paper.

2. After making some general points about transnational mergers and co-operation, two cases that have been assessed by two or more Nordic competition authorities are described in some detail. The description of each case includes a section on any co-operation between the national competition authorities related to the case.

3. This contribution has been worked out with the assistance of the competition authorities of Denmark, Finland and Sweden.

Transnational Mergers and Co-operation

Introduction

4. Transnational mergers involve business activities in more than one country. Such mergers may be handled by several national competition authorities – each relating to the aspects of the merger being within its jurisdiction. Normally, a merger may fall under the jurisdiction of a specific national competition authority if it has an *effect* within the national territory of that authority.

5. When more than one national competition authority assesses a specific transnational merger, problems related to the following issues may occur:

- Divergence concerning whether the merger should be cleared.
- Divergence concerning remedies.
- Requesting and exchanging *information.*
- The limits of the jurisdictions.
- Inefficiencies as a result of double work.
- Differences in national legislation.

6. This creates a need for the co-ordination of decisions and remedies, and for co-operation related to the actual case handling. Co-operation concerning case handling may include notification routines, exchange of expertise, information about and co-ordination of time limits/deadlines, request and exchange of information, analyses of the markets and work sharing.

7. Co-ordination of decisions and remedies may be difficult for several reasons.

8. The decisions made by a competition authority have to comply with the national competition legislations. Hence, the scope for co-ordinating decisions and remedies is limited. In this context it would be useful for national competition authorities to clarify to what extent international aspects of actual cases can play a part within the framework of national legislations.

9. Co-ordination of decisions and remedies beyond this scope may be conditional on changes in national legislation.

Different Types of Co-operation

10. One form of co-operation is that the competition authorities concerned consult each other in actual transnational merger cases. This may imply stronger enforcement and may also represent cost efficiencies related to the case handling.

11. A more substantial form of co-operation could be that the competition authority in the most affected country is given a leading role in the handling of a merger. This could imply having exclusive competence to make the final decision in the case. The other country (countries) should receive insurances that their interests will be taken into account.

12. Accordingly, a country not wishing to intervene against a merger could give the competence to handle the case to another country that wishes to undertake further investigations. If the latter blocks the merger, the former has missed the opportunity to realise a positive effect that the merger could have had in its country. The advantages of this method are that any divergence concerning decisions will be eliminated, that double work is avoided and that the parties relate to only one authority. The disadvantages may be that it, partly because of legal barriers, will require a lot of resources to establish the necessary framework. Also, it is not clear to what extent it is politically feasible.

Exchange of Confidential Information

13. In May 2000 Section 1-8 was added to the Norwegian Competition Act:

> *" In order to fulfil Norway's contractual obligations towards a foreign State or international organisation, the Competition Authority may regardless of the statutory duty of secrecy furnish the competition authorities of foreign States with such information as is necessary to promote the competition rules of Norway or of the State or organisation concerned.*
>
> *Where information is handed over in accordance with the first paragraph, the Competition Authority shall make it a condition that the information may only be passed on to other parties with the consent of the Competition Authority, and only for the purpose covered by such consent.*
>
> *The King may lay down regulations concerning the handing over of information under the first and second paragraph."*

14. Similar amendments were made in the competition legislation of Denmark and Iceland.

15. On this background Denmark, Island and Norway have entered into a formal agreement concerning the exchange of confidential information. The agreement is enclosed in Annex 1.

The Question of Competent Authority - EU, EFTA or National Authorities?

16. An important question concerning transnational mergers is who is the competent authority with respect to approving or intervening against actual mergers. If the threshold levels of the EU Merger Regulation are met, the Commission will be the competent authority and the Merger Regulation will be applied.

17. As an EFTA[1] country within the EEA, Norway is in a particular situation. According to the EEA agreement, the application of EEA legislation to actual mergers is conditional on the threshold values being met within either the EU- or the EFTA States. The competent authority is the European Commission or the EFTA Surveillance Authority respectively. In most cases this implies that the Commission will be the competent authority. So far, there have not been mergers where the threshold values have been met within the territory of EFTA.

18. Another issue regarding the EEA Agreement is that it does not comprise all goods. This is i.a. the case for certain agricultural and fishery products.

19. Mergers between Nordic undertakings have in most cases not met the threshold values within the EFTA or the EU area. Thus, national competition authorities will be competent and national legislation will be applied. National legislation has also been applied when for example goods like beer or carbonated soft drinks have been involved, since they are not subject to the EEA agreement.

Experience concerning Co-operation in Investigating Transnational Mergers

Merger Case: Carlsberg and Pripps/Ringnes

20. Three Nordic competition authorities – Finland, Norway and Sweden – investigated the merger. The Danish Competition Authority did not investigate the merger since their merger legislation first entered into power on 1 October 2000.

Facts

a) Parties to the transaction[2]

Carlsberg AS, Denmark

Pripps/Ringnes AB, Norway

b) The transaction

21. The transaction was a merger between Pripps Ringnes AB and the beer and beverage activities of Carlsberg. The merged company, Carlsberg Brewries AS, is 60 percent owned by Carlsberg and 40 percent owned by Orkla AS (Norway).

c) The relevant product market

i) Norway

1 The member countries of the EFTA are Island, Liechtenstein and Norway.

2 In Sweden Carlsberg A/S and Carlsberg Brewries A/S notified the acquisition of Pripps/Ringnes AB. Other parties involved were Orkla AB (Sweden) and Orkla ASA (Norway)

22. The markets for:

- Beer
- Carbonated Soft Drinks
- Mineral Water

ii) Sweden

23. The markets for:

- Light beer sold in groceries
- Medium strong beer sold in groceries
- Carbonated Soft Drinks sold in groceries
- Mineral water sold in groceries
- Beer sold in the hotel, restaurant and catering markets
- Carbonated Soft Drinks sold in the hotel, restaurant and catering markets
- Mineral water sold in the hotel, restaurant and catering markets
- Strong beer sold in the Systembolaget (a retail State monopoly for strong beer, wine and liqueur).

iii) Finland

24. The markets for:

- Beer
- Cider
- Long-drink
- Soft-drink

d) The relevant geographical markets

Norway, Sweden and Finland - respectively.

e) Issues being assess by the competition authorities

i) Norway

25. Without an intervention by the Norwegian Competition Authority, the merged company would have had exclusive rights to the trademarks of both The Coca Cola Company's (TCCC) and Pepsi in Norway. Coca Cola Drikker (Norway) has a very strong position on the Norwegian market, which implies that it, either alone or with Ringnes/Pepsi, could exercise market power in conflict with the objective of efficient use of the society's resources stated in Section 1-1 of the Norwegian Competition Act.

26. Furthermore, an eventual co-operation between The Coca Cola Company/Coca Cola Drikker and the merged company – which has strong beer trade marks and a co-operation agreement with Pepsi – enhance an anti competitive restriction in the beer market.

ii) Sweden

27. The Swedish Competition Authority found that the merger could create or enhance a dominant position, which could substantially restrict competition in all the relevant markets, except the market for mineral water sold in groceries.

iii) Finland

28. The Finnish Competition Authority found that the merger could lead to collective dominance by the two leading competitors in the relevant markets: Sinebrychoff (a fully owned subsidiary of Carlsberg) and Hartwall (the main competitor of Sinebrychoff). Hartwall has a connection with Carlsberg through their shared ownership of Baltic Beverages Holding. Furthermore, the minority owner of the merged company, Orkla, owned 20 percent of the shares in Baltic Beverages Holding.

f) Conclusions

i) Norway

29. The merger was approved on 13 December 2000, on the following conditions:

1) Carlsberg had to divest its interests in Coca-cola Drikker AS.
2) The merged company should not have ownership in – or sales, production or distribution agreements with:
   - Companies having exclusive rights to The Coca Cola Company's trade marks in the Norwegian mineral water market.
   - Companies producing, distributing or selling The Coca Cola Company's beverages in Norway.

ii) Sweden

30. The merger was approved on 12 December 2000, on the following conditions (proposed by Carlsberg):

1) The Beer market:

31. Carlsberg had to divest several trademarks, and was obliged not to sell goods of certain trademarks licensed from other companies.

2) Carbonated Soft Drinks

32. Carlsberg had to divest its shares in DryckesDistributören AB (distribution company 50 percent owned by Coca Cola Drycker Sverige AB), and Coca Cola Drycker Sverige AB. Furthermore, Carlsberg had to stop distributing Coca Cola and other beverages produced by Coca Cola Drycker Sweden AB.

iii) Finland

33. The merger was approved on 4 January 2000, on the following conditions:

1) Orkla should sell its shares in Hartwall, and may not appoint members to the board or other organs in the company.

2) Carlsberg may not appoint the same person to the boards of Sinebrychoff and Baltic Beverages Holding..
3) AB Pripps had to get out of certain agreements with Hartwall.

Co-operation between National Competition Authorities

- The Danish, Finnish, Norwegian and Swedish Competition Authorities were notified of the merger almost simultaneously, in mid August 2000.
- The Finnish, Norwegian and Swedish Competition Authorities entered into an informal dialogue at an early stage. The Swedish Authority had, in a preliminary meeting with the parties, stated that it had certain objections related to the merger. However, substantial matters concerning the merger was not discussed until competition authorities met in Stockholm:
- On 24 October 2000 a meeting between the Danish, Finnish, Norwegian and Swedish Competition Authorities took place in Stockholm. A few days in advance the Norwegian Competition Authority had informed the parties that it would investigate the case further. During the meeting views on the case was exchanged. It was i.a. learned that the Finnish and Swedish Competition Authorities used narrower market definitions than the Norwegian Authority.
- The Norwegian Competition Authority contacted the Swedish Authority the day before the decision was send to the parties - and learned i.a. that the Swedish would oblige Carlsberg to stop co-operation with Coca Cola Drycker Sverige AB.

Lessons

34. As soon as a case is initiated one should contact the competition authorities in the relevant countries. The four-country meeting would have been even more useful if it had been held at an earlier stage. Some countries give notices to the parties on an early stage, whether they find reason for further investigation of a case or not. Also, one discovered that the country's definitions of the relevant markets were quite different. One aspect of this is that the requests for information from the parties could be based on these definitions. One does often not have the time to ask for substantial amounts of information more then once during an investigation procedure. The Swedish Competition Authority had pre-notification meetings with the parties, and identified a number of relevant product markets

35. The merger had different effects in the three geographical markets (countries). The Finnish Competition Authority was concerned about collective dominance of the merged company and its largest competitor. In Norway one was mainly concerned with the market for carbonated soft drinks. In Sweden and Norway the merged company would gain control over the trademarks of both Pepsi and Coca Cola. Also, The Swedish Competition Authority looked at the increased concentration in the beer markets, which was more substantial than in Norway (in rough estimates from 30 to 60 percent in Sweden and from 59 to 62 percent in Norway). The Swedish Authority also investigated the soft drinks market. We were also aware of the Finnish Competition Authority investigating the acquisition.

36. A question that should be discussed at an early stage is whether the European Commission can handle such cases, and whether this would entail more balanced analyses and decisions/remedies?

37. In light of the Nordic agreement concerning exchange of information it has now become easier to exchange experiences. But, the agreement is limited to Denmark, Iceland and Norway.

ANNEX

Agreement between Denmark, Iceland and Norway on Co-operation in Competition Cases

Denmark, Iceland and Norway,

- wishing to further strengthen and formalise co-operation between the Danish, Icelandic and Norwegian Competition Authorities for the purpose of achieving more effective enforcement of the three countries' national competition legislation,
- which may, pursuant to their national competition legislation, exchange information that is subject to a duty of confidentiality with other countries' Competition Authorities provided the furnishing of information is necessary in order to foster enforcement of these countries' competition legislation, and if the provision of such information occurs with a view to fulfilling Denmark, Iceland and Norway's bilateral or multilateral obligations,

agree on the following:

Article I
Definitions

In this Agreement, the following expressions and terms have the following meaning:

a) "Competition legislation" means applicable legislation, which is currently:

i) in the case of Denmark, Act No. 384 of 17 June 1997 with subsequent amendments, cf. Consolidated Act No. 687 of 12 July 2000, and executive order issued under this Act

ii) in the case of Iceland, Act No. 8 of 25 February 1993, Competition Act with subsequent amendments,

iii) in the case of Norway, Act No. 65 of 11 June 1993 relating to Competition in Commercial Activity, Act No. 66 of 11 June 1993 relating to Price Policy, with subsequent amendments.

"Competition Authority/Authorities", "Authority/Authorities" and "Party/Parties" mean

i) in the case of Denmark: Konkurrencestyrelsen,

ii) in the case of Iceland: Samkeppnisstofnun,

iii) in the case of Norway: Konkurransetilsynet.

"Enforcement measures" means:

i) use of competition legislation in connection with investigations, control, decisions and procedures by one or more of the Authorities.

b) "Anti-competitive activities" or "behaviour" will depend on the respective Parties competition legislation and may, for example, consist in:

i) fixing purchase or selling prices or any other trading conditions,

ii) limiting or controlling production, sales, technical development or investment,

iii) share markets or sources of supply,

iv) applying dissimilar condition to equivalent transactions with other trading parties,

v) making the conclusion of contracts subject to acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract, or

vi) abusing a dominant or collectively dominant position.

c) "Mergers" and the "acquisition of undertakings" are defined in:

i) in the case of Denmark: § 12 a in Act No. 416 of 12 July 2000,

ii) in the case of Iceland: § 4 and 18 in Act No. 8 of 25 February 1993, cf. Act No. 107 of 25 May 2000,

iii) in the case of Norway: § 3-11 in Act No. 65 of 11 June 1993 relating to Competition in Commercial Activity.

Article II
Notification

1. The Danish, Icelandic and Norwegian Competition Authorities provide each other with information concerning matters where one Authority becomes aware of the fact that its enforcement measures could have a bearing on significant competitive interests that come under the competence of another Authority.

Enforcement measures for which it would normally be suitable to provide notification include such measures that:

a) are relevant to the enforcement measures of one, two or all three of the Competition Authorities,

b) concern anti-competitive activities that largely originate or take place in the territories of one, two or all three of the Authorities,

c) concern a merger or acquisition of an undertaking in which one or more of the parties to the transaction is an undertaking that is registered, founded pursuant to the legislation of, or domiciled in Denmark, Iceland or Norway, or in two or all three countries,

d) concern anti-competitive behaviour which one assumes a contracting country has required, fostered or approved,

e) concern decisions of an intervening nature which will require or prohibit a specific anti-competitive behaviour in another Party's territory.

2. In the case of mergers or the acquisition of undertakings that could have a substantial effect on competitive interests that come under the competence of another Authority, and which pursuant to the legislation shall be reported to the Competition Authorities and/or the Authorities become aware of and/or they themselves take up for discussion, advance notice shall be given pursuant to this article:

a) in the case of Denmark: to Konkurrencestyrelsen,

b) in the case of Iceland: to Samkeppnisstofnun,

c) in the case of Norway: to Konkurransetilsynet.

3. The Danish, Icelandic and Norwegian Competition Authorities will also provide each other with information about cases where the Competition Authorities intervene or otherwise participate in an administrative or judicial process that is not followed by enforcement measures, in which the questions raised during the intervention or participation may have a bearing on significant competitive interests of one of the other Parties to the Agreement.

Article III
The exchange of non-confidential information

1. The Parties agree that it is in their common interest to exchange non-confidential information which

a) facilitates the more effective application of their respective competition legislation, or

b) improves their understanding of the legal and financial conditions and theories that are relevant to the Parties' enforcement measures etc., or to matters mentioned in Article II(3).

Article IV
The exchange of confidential information

1. The Parties agree that it is in their common interest to exchange confidential information. It is a condition for the Competition Authorities' submission of confidential information that such information:

a) is subject to a duty of confidentiality in the Competition Authority that receives the information that is at least equal to that of the Competition Authority that provides the confidential information, and

b) may exclusively be used for the purposes stipulated in this Agreement, and

c) may only be passed on by the Competition Authority that receives the information if it has obtained in advance the express consent of the Competition Authority that supplied the information, and that it is only used for the purpose covered by such consent.

Article V
Formal requirements, etc.

Information passed from one Competition Authority to another Competition Authority pursuant to Article II of this Agreement shall be in writing (including by facsimile and e-mail). Other communications shall be verbal or in writing.

The Parties shall keep each other informed in writing about any changes that occur in their competition legislation or other legislation subsequent to the signing of this Agreement that may have a bearing on this Agreement.

Article VI
New contracting parties

Provided all Parties to the Agreement consent, this Agreement may be extended to embrace new contracting parties.

Article VII
Entry into force

This Agreement enters into force on 1st April 2001.

Article VIII
Revision and termination

This Agreement may be revised at any time.
This Agreement may be terminated by any Party provided sixty - 60 - days' advance notice is given in writing.

Done at Copenhagen, on 16 March 2001, with one copy in each of the languages Danish, Icelandic and Norwegian, which texts shall each have the same validity.

UNITED STATES

1. It is timely and appropriate for the OECD Competition Law and Policy Committee (CLP) to take stock of international co-operation in transnational mergers. Almost ten years ago, in November 1991, the CLP mandated a study, conducted by Professors Richard Whish and Diane Wood, of multi-jurisdiction merger review. The report was published at about the same time as the 1990s merger wave gathered force.[1] This wave was marked by transnational mergers that presented both a challenge and an opportunity to OECD Members' antitrust authorities - a challenge to their ability to enforce their laws effectively on behalf of their consumers and an opportunity to utilise the co-operative mechanisms provided in the OECD Recommendation and in comparable bilateral co-operation agreements to enhance their enforcement efficiency and effectiveness. The challenge has been met and the opportunity was grasped. However, as the Secretariat's paper[2] notes, there are issues that merit further examination in light of the experience gained during the past decade.

2. The purpose of this paper to comment on some of the issues raised by the Secretariat's issues paper, specifically the types of mergers and issues that benefit from co-operation and the methodology of co-operation. First, however, we suggest some lessons learned from the past decade of co-operation based on the experience of the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice:

- Informing other jurisdictions whose interests are implicated by an investigation or enforcement action remains a key, initial element in effective co-operation.
- Procedural differences do not defeat co-operation.
- Co-operation has fostered convergence in merger analysis, especially in market definition, assessment of competitive effects, and remedies.
- Co-operation can minimize or even avoid conflict, but it cannot be expected to override all differences including those based upon application of different substantive standards, or on different competitive impacts in different jurisdictions.
- It may be more difficult to change and harmonise the procedural aspects of merger control than substantive standards.
- Co-operation can be multilateral as well as bilateral (*e.g., Federal-Mogul/T&N*).

The Range of Opportunities for Beneficial Co-operation

3. The potential benefits of co-operation do not appear to be concentrated upon, or limited to, any particular types of mergers. In the past year alone, fruitful Cupertino among U.S. and foreign authorities has occurred in: horizontal mergers (*e.g., WorldComMCI/Sprint*); vertical mergers (*e.g., Boeing/Hughes*); mergers that raised concern as to both unilateral effects and potential co-ordinated interaction (*e.g., Time Warner/EMI*); mergers in which the geographic scope of the effects was world-wide (*e.g., Boeing/Hughes, Alcoa/Reynolds*) or differentiated among several geographic markets (*e.g., Air Liquide-Air Products/BOC* and *AOL/Time Warner*); and in agreements that raised both merger and non-merger issues (*Covisint*).

4. While the opportunity for Co-operation among authorities may appear to be greater in cases in which the relevant geographic market is world-wide, as suggested by the Secretariat (¶ 5), experience teaches that authorities must remain vigilant in cases affecting several geographic markets to avoid potentially conflicting remedies. For example, in *Ciba-Geigy/Sandoz*, both the European Commission and

the FTC sought remedies that involved Sandoz's production of Methoprene; coordination was necessary to avoid placing Sandoz under conflicting obligations.

5. There are many transnational mergers that require little, if any, communication or co-operation among authorities. For example, a foreign direct investment that affects a market that is local, or even national, in scope, may be of no concern to the authorities in the investor's home country (*e.g.*, a supermarket chain based in Europe, that acquires a group of supermarkets in the United States).

6. The Secretariat's paper (¶ 8) correctly notes, however, that "[t]he possibility of international co-operation exists, of course, even when only one country has competitive concerns about a merger." The experience of the U.S. agencies bears this out. There have been numerous instances in which a proposed merger has not been challenged in the United States and thereafter the relevant U.S. agency is contacted by a foreign agency that is reviewing the transaction. In some such cases, the U.S. agencies may have non-confidential information that may be useful to the foreign enforcement authority - for example, the identification of a circumstance in the United States that would differentiate the market effects there from those outside the United States. There also have been many instances in which foreign authorities have sought the advice of the U.S. agencies in merger cases that affect product markets in which the United States agencies have much experience (*e.g.*, soft drinks). Likewise, the U.S. agencies have sought information from their foreign counterparts concerning, for example, previous cases in the same industry in which those agencies can share non-confidential information that may validate or differentiate a market definition or the assessment of competitive effects.

Procedural Issues

1. The need for timely contact

7. It is to be expected that "mega-mergers" - for example, *Exxon/Mobil*, *AOL/Time Warner*, *WorldCom-MCI/Sprint* - will receive thorough attention from the enforcers. But there are many lower profile transnational mergers that nevertheless raise concerns in one or more countries. In some cases, potential concerns in other jurisdictions are not readily apparent, but authorities must recognise important interests of other Members and notify accordingly under the 1995 OECD Recommendation concerning co-operation.[3] (There have been recent cases involving clear U.S. interest in which the United States was not notified.)

8. In addition to formal notifications, informal contacts are a valuable aid to co-operation. Advances in communications technology during the 1990s, especially electronic mail, have increased the number and level of contacts between enforcement agencies. Similarly, the increased availability of documents, such as decisions, reports, and press releases, in electronic format, has facilitated sharing public information that was heretofore not readily available in foreign countries. These technologies make it easier for officials in one jurisdiction to informally contact their counterparts in other jurisdictions to inform and inquire about matters that may be of interest in the other jurisdiction. Although the merger wave and other business activities have put great pressure on antitrust enforcement agencies around the world, these communications technologies make it quick and easy to send informal inquiries. The Members' antitrust authorities need to remain aware of the increased potential for mergers to have competitive effects outside their jurisdiction, and to make informal inquiries when foreign interests, potential or apparent, are present.

9. Although the EC-U.S. co-operation agreement[4] calls for the U.S. authorities to make notification in merger cases no later than the issuance of the so-called "second request," the agencies typically are in contact much earlier than that; in fact, U.S. and EC authorities regularly consult during the first phase of investigations. Establishing contact early in the process can facilitate expeditious focus on issues of

concern, or on clearance where the analysis and consultation leads to the conclusion that there is no need for further investigation.

2. Co-operation in the analysis phase

10. Much recent attention to international enforcement co-operation has focused on co-ordination in the remedial phase of a multi-jurisdictional case. The Secretariat's paper (following ¶ 8) states that, "Co-operation in the remedy phase has been the most common and most successful of all types of co-operation so far." Less well-known to the general public - but certainly well-known to counselors and companies whose mergers have been cleared - is the extent to which the authorities consult and share information and analyses, either non-confidential or subject to a confidentiality waiver, that result in decisions to clear mergers.

11. Co-operation in the analysis phase is no less prevalent or important than in the remedial phase. Remedial action is based on a finding of competitive harm, measured against the merger laws enforced by the reviewing jurisdictions. Before reaching that finding, the enforcers must define the product and geographic markets affected by the proposed merger, determine the nature of the competitive harm that would result (*e.g.*, single firm dominance or co-ordinated interaction in an oligopolistic market), and consider whether there are factors (such as entry) that would counter the competitive harm.

12. It is in these areas of analysis that there has been the most progress in convergence among enforcement agencies during the 1990s. A notable example is market definition, where, for example, the provisions of the United States' Horizontal Merger Guidelines[5] and the European Commission's Notice on the definition of the relevant market[6] are very similar, and the agencies usually arrive at similar results. Experienced counsellors have also noted substantial convergence in the assessment of competitive effects,[7] although there continue to be significant differences in approaches to some important issues (*e.g.*, bundling theories, efficiencies).

13. It is still necessary, of course, for the respective authorities to work through the issues in each case. Several recent cases have posed complicated market definition issues. In some cases, the evolution of product markets in Europe and the United States have not proceeded at the same pace, so that the relevant product market may be different in the reviewing jurisdictions. In the case of a recent merger reviewed, but not challenged, by U.S. and EC authorities, the staffs had several lengthy telephone conversations about the scope of the relevant market, the definition of which would determine whether the merger ought to be challenged.

14. Likewise, transnational mergers can have different competitive effects across jurisdictions. For example, market concentration levels may vary significantly among reviewing jurisdictions, or the likelihood of co-ordinated interaction in an oligopolistic market may be greater in one jurisdiction than in another.

15. The reviewing authorities must address each of these factors. Some cases present clear-cut competitive problems that enable the reviewing authorities to come to quick agreement on the analysis and move on to the subject of remedies. When that is not the case, the officials must keep their priorities in order and focus on the basic elements of merger analysis.

3. Co-operation between enforcers and parties

16. Although restraints on disclosure of confidential business information can limit co-operation among enforcement agencies (Secretariat paper, ¶ 13), this has not precluded co-operation. There is much

useful information that the agencies can share,[8] and the authorities have successfully co-operated in the absence of confidentiality waivers.

17. As multi-jurisdictional review has become more common, parties have been increasingly willing to grant limited waivers of confidentiality - limited in the sense that they permit the enforcers to share information the parties submit, subject to the continuing obligation to maintain its confidentiality as to third parties and the general public. The earliest waivers in merger cases were typically granted in the remedy phase, after agreement had been reached that the merger would be cleared subject to conditions. Parties readily recognised the potential for conflicting obligations and began to share their settlement proposals with each reviewing agency and, in some cases, took further steps to facilitate a co-ordinated review of the settlement proposals.

18. Over the last few years, parties have more frequently granted unlimited waivers at the beginning of the review. The grant of a waiver makes it easier for the reviewing authorities and the parties to identify and address issues of concern as early as possible. Of course, it is the parties' choice whether to grant a waiver, and there is no penalty or adverse inference if they choose to maintain their confidentiality protections and rights.

19. Whether parties will continue this trend remains to be seen. The authorities can encourage it by continued scrupulous adherence to their confidentiality rules and by appropriately focused use of the waiver authority granted by the parties.

20. The Secretariat's paper (¶ 15) states that "competition officials sometimes express the view that the business community's reticence about waivers has less to do with concerns about unauthorised downstream disclosure and more to do with a desire to hinder the co-operative effort." There may be some cases in which parties do not wish to facilitate co-operation, but they have become increasingly rare. Parties realise that to "get the deal through" they must deal with each of the reviewing authorities and it appears that they have learned that it is more efficient to do so when they facilitate communication, co-operation, and co-ordination among the reviewing authorities.

Conclusion

21. Co-operation is built upon communication, mutual respect, and a commitment to minimise conflicts in enforcement. Where co-operation exists, co-ordination can take place. Convergence in analysis can be a valuable by-product. But co-operation requires maintenance; in the first instance, it requires timely communication and a nurturing of relationships among the authorities. Just as the authorities must be vigilant for anti-competitive activities, they must likewise faithfully carry out the co-operative measures recommended by the OECD and contained in the numerous antitrust enforcement co-operation agreements.

NOTES

1 OECD, Merger Cases in the Real World: A Study of Merger Control Procedures, Paris, 1994.

2 DAFFE/CLP/WP3(2001)5, 27 Apr 2001.

3 Revised Recommendation of the Council concerning co-operation between member countries on anticompetitive practices affecting international trade, C(95)130/FINAL (27-28 July 1995), *available at:* http://www.oecd.fr/daf/clp/Recommendations/REC8COM.HTM.

4 Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 23 Sept. 1991, *reprinted in* 4 Trade Reg. Rpt. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995), *available at* <http://www.usdoj.gov/atr/public/international/docs/ec.htmt>, at Art. II.3.(a)(i).

5 U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997, *available at:* http://www.ftc.gov/bc/docs/horizmer.htm.

6 Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9 Dec. 1997; *available at:* http://europa.eu.int/comm/competition/antitrust/relevma_en.html.

7 *See, e.g.*, Robert D. Stoner, "Convergence of U.S. and E.U. Merger Enforcement," Economists Ink, Economists Incorporated, Spring/Summer 2000, at 1; and William J. Kolasky, Jr. and Leon B. Greenfield, "Merger review in the EU and US: substantive convergence and procedural dissonance," Global Competition Rev., Oct./Nov. 1998, at 22.

8 *See, e.g.*, the depiction in Parisi, Enforcement Co-operation Among Antitrust Authorities, 20 ECLR 133 (Mar. 99) or http://www.ftc.gov/speeches/other/ibc99059911update.htm

EUROPEAN COMMISSION

1. Over the last decade, the European Commission has, as will be described in more detail below, accumulated a certain level of experience in co-operating with other competition authorities in the field of merger control. The Commission obviously has a very close working relationship with the competition authorities of the Member States. However, for the purpose of the issues of interest to the Roundtable, the experience relating to co-operation with the US authorities will be used as a basis for this paper.

2. Overall co-ordination can and should be of mutual benefit for all involved. It must be stressed, however, that preconditions involve:

- each participant to have sufficient understanding of the other one's legal and procedural framework,
- each participant's willingness and ability to invest sufficient time and resources to further real progress,
- ability to discuss relevant issues in a sufficiently open manner.

A. The EU-US co-operation is today a necessity because of the globalisation

The globalisation process

3. The merger boom of the 1990s has been the result of several events: the increasing liberalisation and globalisation of industry, the closer integration of world markets through finance and trade, and the creation of the European Single Market, among other factors.

4. This recent merger wave is noteworthy – not just for its sheer size in terms of value and range of industries involved – but for its truly global scale. Global mergers of today go beyond the simple combination of activities of different regions of the world: they might better be described as the world-wide integration and consolidation of such activities. They also tend to occur on a more frequent basis, albeit with a certain relationship to general economic cycles as well as industry cycles. As a result, many of the transactions which have taken place in recent years have significantly modified the fundamentals of competition in the industries concerned, and this on a global scale.

What is co-operation about?

5. Traditionally, the Commission has co-operated on a bilateral basis with the US agencies and later with the Canadian and the Japanese authorities. Multilateral aspects will be addressed below. However, given the sheer importance of the US and the EU markets and companies - reflected in a number of recent high-profile mega-mergers - much focus is of course on the EU - US co-operation.

Legal basis : treaty and waivers : can only work on a voluntary basis

6. The legal basis for the EU/US co-operation is both the existing bilateral co-operation agreements between the US and the EU and the ad-hoc waivers granted by companies in the course of individual merger reviews.

7. In 1991, the Commission concluded a co-operation agreement with the US regarding the application of our respective competition laws. This was one of the first agreements of its kind. Some

important features should be pointed out. The main provisions of the agreement relevant to merger control deal with information on cases of interest to the other agency, co-operation and co-ordination of the enforcement actions of both parties' competition agencies and "traditional comity" procedure under which each party undertakes to take into account the important interests of the other party.

8. It is important to stress that the agreement does not in itself make in-depth co-operation between agencies possible on a case-basis. Indeed it does not allow for the exchange of any confidential information, unless the companies involved agree to it.

9. In fact, the co-operation between US and EU agencies in the review of concentrations made its first real advances only because the parties to these mergers granted waivers allowing each agency to exchange confidential information. This practice has over time increased the familiarity of companies and their legal representatives of the benefits involved in an open dialogue between the agencies. It reflects a very important point, namely that the EU-US co-operation benefits all parties involved - merging parties and competition agencies.

Object of the co-operation : procedure, facts, assessment and remedies

10. Roughly speaking, a merger review consists of the following successive stages or steps : fact gathering, issue identification, assessment, statement to the parties of the agency's position and, eventually, negotiation and definition of remedies. Whereas these steps are common to the US and EU process, it is stating the obvious that they take place under different legal and procedural rules. The co-operation aims at ensuring maximum consistency throughout these steps in the context of separate legal tests and procedures.

11. In cases of mutual interest, close EU/US co-operation has become standard practice. In high profile cases, this occurs at several stages of the procedure, with staff-level contacts on an almost daily basis via telephone, e-mail, video conferences and, on some occasions, face-to-face meetings. These contacts, together with the exchange of confidential information under our confidentiality waiver provisions, are most fruitful as they lead to a mutual awareness of the other side's view of the competition "picture." It helps to identify as quickly as possible what each side considers to be the competition problems and to clarify the extent to which this, as is often the case, differs in each jurisdiction. In this context, different outcomes therefore need not reflect divergent or even conflicting approaches but simply different competition problems (or degrees thereof).

12. For instance, in the WorldCom / Sprint review, the co-operation between the Commission and the US Department of Justice involved exchanges of and concerning information submitted by the parties. In addition, many of the responses from third parties were shared by the agencies on the basis of waivers. The EU had to collect Internet traffic and revenue data from a large number of companies domiciled in the US. This was only made possible due to the intense co-operation that took place between the European Commission and the US Department of Justice. Such an extensive sharing of information allowed both case teams to discuss in-depth the merits of the case and of the submissions from the parties and third parties and to reach consistent assessments of the competitive impact of the transaction on the area of joint concern.

13. At the stage of stating formally the competition concerns to WorldCom and Sprint, representatives of the other agency were attending such meetings. Thus, representatives of the US Department of Justice attended the oral hearing in Brussels, and a representative of the Commission was present in one of the pitch-meetings that took place at the US Department of Justice. Clearly this procedure is beneficial to all parties, and it will be a practice that will be continued whenever relevant. Finally, we

discussed at length the proposed divestiture of the Sprint Internet business that the parties submitted and eventually withdrew in the face of our opposition.

14. We have also seen co-operation efforts at the remedy stage of proceedings coming into greater prominence recently. Last year, for example, this included the parallel negotiation and assessment of remedies, with a view to preventing incompatible results in the various remedies agreed, as was done in *Alcoa / Reynolds* and *AstraZeneca / Novartis.* In the latter case this was important because, even though the relevant geographic markets were national, the implementation of the commitments had, owing to the nature of the intellectual property rights involved, to be executed on a world-wide basis.

The limits of co-operation

The aim of co-operation is to ensure a maximum of consistency not to reach a single end-result

15. As was stated earlier, the aim of co-operation is to ensure maximum consistency throughout the various stages of the respective procedures and in the context of separate legal tests and procedures. This imposes limits, which are perfectly legitimate, on what can be expected from co-operation.

16. Despite different substantive standards, when the investigated markets are similar, we have produced similar results in such major cases as *WorldCom/Sprint* and *Alcoa/Reynolds*. In the former case, both the Commission and the FTC concluded that a prohibition was warranted. In the latter transaction, we both agreed there were competition problems that required serious remedial action. We also agreed on the existence of a world-wide relevant geographic market with different effects found in the US *vis-à-vis* the Community. Ultimately the most significant part of the remedy involved divestiture of one of the party's major production plants that happened to be located, neither in the EU nor in the US, but in Australia.

17. Merger assessment in certain industries may be less likely to lead to similar remedies being imposed. This occurs notably when the markets have a more regional scope. For example, while the major competitors in such industries as pharmaceuticals and chemicals are present throughout the world, the main competition effects in these industries have often differed as between the US and EU. (*See* for example the recent cases of *AstraZeneca/Novartis* and *Dow Chemicals/UCC*, where the remedies that were fashioned by the EU and US authorities, respectively, were customised to meet the specific problems identified in each jurisdiction.)

18. Another case worth commenting on is *Air Liquide/BOC*, where EU/US co-operation was extremely thorough throughout the proceedings. Here, too, the competitive effects and thus the remedial results were quite different as between the EU and US. And this was as a result of different competition concerns. In the Community, the Commission found that the concerns raised by the combination of two competitors – one with a dominant position in France, and the other with a dominant position in the UK – could be resolved by a remedy requiring BOC's divestiture of its 25% share in the UK market, thereby immediately introducing the competition of a new competitor to balance out the loss of competitive pressure. In the US, however, the issue was one of elimination of actual, not potential, competition – and the consequent reduction of players from 4 to 3 in a highly concentrated market. Thus, the type of remedy that was found satisfactory in the EU was not considered to be adequate in the US. Consequently, the US government sought to impose stricter measures – measures that the parties found so burdensome that they abandoned the deal entirely. Thus, despite being cleared conditionally in the EU, the deal finally fell apart.

19. In such instances where the markets may be different, but also where the time scales of the investigations may be incompatible, co-operation can still have two important functions. The first is to ensure that action undertaken by one agency does not unnecessarily impinge on the other's ability to react. Sharing of information in a timely manner significantly reduces this risk. Second, it is important to ensure that companies are not unduly harmed by the two parallel investigations and remedies. The latter can be

exemplified with the *Exxon / Mobil* case, where we accepted a provision that if another jurisdiction imposed remedies that were incompatible with those negotiated with the Commission, the parties were entitled to demonstrate this and suggest means to remove the incongruity. Of course, this would have to be done in keeping with the competition goals of the agreed upon remedies to the greatest extent possible.

Co-operation does not necessarily lead to the same conclusion : The Boeing / McDonnell Douglas case

20. Naturally, co-operation does not provide absolute protection to the merging parties against diverging analysis on a similar issue from the competition agencies. The one, high-profile, example is of course the *Boeing/McDonnell Douglas* case. Following this case, many asserted that the case showed the weakness and failure of the EU/US co-operation in the field of merger control. I believe this to be a very exaggerated view and that, in fact, these commentators have been proven wrong. This is certainly the case looking at the subsequent practice, where many successful instances of co-operation has demonstrated both agencies ability to look beyond the results of that case. However, even when looking at the way the co-operation was handled in that case, the striking point is that both agencies communicated and exchanged opinions and facts all throughout the procedure. Thus, whilst not leading to the same conclusion, the case was indeed an instance of very professional co-operation.

21. The reason why the Commission felt the need to act in a merger between two US companies which had no manufacturing operations in the Community was of course that the sale of commercial aircraft is a truly global business. Although the agreement and the merger itself took place in the US, the merged entity would be active all over the world – including the Community. Thus, no single national geographic market could be separated out and analysed separately. In simple terms, by exporting aircraft into the EU, the parties to this merger were economically active here in Europe.

22. The substantive concerns related to Boeing's dominant position in the world civil aircraft industry. The investigation showed that the merger would have strengthened Boeing’s position in this world market by raising incentives to lock in customers (foreclosure effects of long-term exclusive contracts with airlines active in Europe) and by the ownership of important technological rights. The remedies agreed with Boeing were therefore aimed at addressing these concerns.

Thus, *Boeing* teaches us that certain complex multinational transactions will expose differences in approach, in fact-finding, in analysis – and sometimes, in the ultimate conclusion. Such disparity will, no doubt, occur again. No co-operation agreement will ever be able to exclude this but, if anything, the case demonstrated that many mergers raise global issues and that co-operation between agencies in such cases is important.

There are some unavoidable differences (procedures, efficiencies, legal test)

23. Notwithstanding broad areas of substantive convergence, there still remain some divergences in the enforcement approaches of the EU and US agencies (as well as between most other agencies world-wide).

24. There are well-known differences between the substantive test employed in the EU (i.e. dominance) and the American test of substantial lessening of competition, coupled with provisions for considering efficiency claims. Most commentators, however, agree that the end-result of applying these tests has today become difficult to measure.

25. It should also be mentioned that the EU and US test can be said to converge in one very important respect, namely that both are focussed on essentially only a competition based test. In other words, neither system attaches any significant weight to non-competition based arguments, such as

industrial, regional or social policy type of considerations. This similarity in approach is certainly a factor behind the successful track-record of co-operation.

26. While the analytical approaches of the EU and US agencies are increasingly convergent, it is true that the procedures – and particularly the time limits – differ to a considerable extent. This can lead to some practical difficulties, though not insurmountable ones, in that one jurisdiction (very often it is the EU, given our strict deadlines of maximum 5 months) has to take a decision first.

27. A second area in which there is divergence in timing is the point at which parties are allowed to submit their initial filings. In this regard, the US approach is generally considered more flexible than that of the Merger Regulation. In the US, the HSR pre-merger notification system permits filing at any time after the execution of a letter of intent, agreement in principle, contract, or a public bid.

28. In practice it is often difficult to fully harmonise the EU and US deadlines in second-phase cases, although the scope for harmonisation increases if the merging parties plan their filings with a view to accommodate such convergence. The Commission has a statutorily four-month deadline fixed for Phase II cases. This fixed deadline is generally praised for the legal certainty that follows from its straightforward, objective time limit. Under the Second Request procedure in the US, the second-phase time frame is not fixed, but dependent on compliance with the request. It is actually established only after the parties show "substantial compliance" with the second request for information (though it should be noted that this time frame is, thus, fully within the control of the notifying parties).

B. Where can we go from the current state of affairs?

29. One may wonder what could be added to the existing co-operation between the US and the EU. Many people have ambitious ideas on possible improvements of the review of global mergers. Some speak about setting up a global agency or a form of a clearing house, some other say that we should forget about bilateral co-operation and enter into wide-ranging multilateral negotiations. All these ideas are probably worthwhile exploring (some more than others). However, considering the respective objectives of companies and competition agencies in relation to merger control, it is clear that all involved stand to gain if we develop the tools further, whilst remaining essentially pragmatic in our approach to international enforcement co-operation.

A reminder : the reasons why we co-operate

30. As stated above, effective co-operation can only be put in place if there is a shared willingness by the agencies and parties. Co-operation takes place because agencies expect to be put in a position to increase the efficiency of their action, to adopt better-informed positions and ultimately to increase the public welfare. The most notable case where an agency has such an interest is probably when action is needed outside of its own geographic territory. One example may be when facts need to be gathered from companies located outside of the territorial jurisdiction. The same goes for cases that involve assessment of effects on competition on a global scale and where possible remedies involve wider than national activities.

31. It should be stressed that enforcement agencies have a very strong incentive to find practical ways to implement such co-operation. A unified approach is simply much more effective to achieve the public welfare than any alternative solution. For instance, it is certainly not in the interest of the Commission or any other enforcement agency to find its efforts to ensure compliance with an agreed remedy frustrated by conflicting demands from another jurisdiction. It follows from this that lack of co-ordination should not automatically be assumed to result from a lack of willingness among the enforcement agencies.

32. Let me turn now to companies, and the reasons why they normally are also in favour of co-operation. The cost for companies of merger control can roughly speaking be put into two categories : legal and other advisers fees and opportunity cost/legal uncertainties raised by the existence of multiple reviews. International co-operation cannot reduce the number of procedures and therefore has no direct impact on legal and other advisers fees. (This is in contrast with the "one-stop-shop" system for merger control within the EU.)

33. However, co-operation can certainly help in reducing legal uncertainty for companies. Indeed, ensuring that competition agencies co-ordinate to the fullest possible extent at all stages of the procedure will increase the likelihood of compatible timetable and consistent assessments and solutions to possible concerns.

34. This is further reflected in a growing phenomenon: the granting of waivers by third parties. This happened, for instance, the case in the WorldCom / Sprint case. It shows that also third parties have started to realise the added value of being sure that their concerns are voiced and discussed not only within each agency but also between agencies.

How to improve EU-US co-operation

35. The best way to ensure continued and increasing quality of merger assessments is certainly to never be fully satisfied with the current state of affairs. International co-operation is no exception, and there are certainly still ways to make it even more satisfying to both merging parties and competition agencies.

36. To begin with the co-operation on cases, there is still scope for the competition agencies involved to identify best practices and make sure that in the future they are consistently applied. One such area would definitely relate to standardisation of some instruments such as waivers. Agencies also have a common interest to consider the possibility of collaborating to standardise the manner in which the most rudimentary types of sales and market data are provided in these cases. Clearly, in such circumstances there would be no loss of information obtained by the agencies involved, while there would be time- and cost-savings for the notifying parties in compiling the data, by eliminating the duplication of efforts. This would be a most useful preliminary step in the direction of harmonisation. Similarly, requests for information on a common issue could feature jointly prepared text asking for the possibility to share the information under confidentiality guaranties both in the EU and in the US. These are measures that could be taken without pursuing a more ambitious project aiming for convergence between the filing requirements or filing forms.

37. A last example could be on letters requesting co-operation of the other agency. This may occur when the implementation of a remedy may take place on another agency territory. This was made for instance in the WorldCom / MCI case. Another instance would be when the creation or strengthening of dominance on a market under the jurisdiction of the other agency may lead to competitive effects on the territory of the first. This was made for instance in the WorldCom / Sprint case.

38. Going further than co-operation on cases, bilateral co-operation with the competent US authorities (DOJ, FTC) has been further enhanced during the course of recent years through such exercises as mutual attendance of conferences, and exchanges of high level visits and meetings, all helping to promote understanding and to minimise the risk of friction.

39. A joint EU/US Working Group has been set up to explore the scope for further convergence in merger cases being treated in both jurisdictions, with a mandate to focus on two important areas in particular: (1) the review of our respective approaches towards remedies; and (2) the scope for further

convergence of analysis/methodology in merger cases, particularly regarding oligopoly/collective dominance/co-ordinated interaction. To date, discussions have focused on assessment, acceptance and implementation of remedies under the EU and US merger control rules.

40. In view of the extensive experience that the US agencies have had over the years in executing remedies in merger cases, the exchange of views provided valuable input to the formulation of the Commission Notice on remedies. The Notice, adopted by the Commission in December of last year, is the first effort by an antitrust authority to provide written guidelines in the area of remedies, thereby increasing transparency. Although the primary users of the Notice will be companies and their advisors, the increased transparency should also facilitate co-operation. An interesting fact is that the discussions in the Working Group showed the extensive degree of convergence that already existed between the agencies in the area of remedies.

How to deal with globalisation of merger control

No need for a global agency (too few real global cases and insurmountable problems and legal issues)

41. Beyond US and EU agencies, companies that are active on a global scale and intend to proceed with a concentration have to comply with an increasing number of regulatory reviews and approvals. The complexity of the processes that needs to be followed is illustrated by, *inter alia*, the publication of guidelines by international law firms on the high and increasing number of regulatory regimes that companies have to abide by in order to realise a transaction. This results in higher transaction costs (legal fees) and it also raises risks of diverging assessments by the various involved competition agencies (including possible remedies) and therefore increases the legal costs and uncertainty that companies face. Obviously, it also makes the provision of advice a more complicated task for legal practitioners. Finally, it should not be overlooked that the same development may increase the complexity from the viewpoint of the involved competition authorities.

42. Some have raised the issue of whether a single agency whose aim would be to assess global mergers would not be more efficient than co-operation. One argument is that this would be similar to the track that EU Member States have followed by agreeing on the Merger Regulation and its "one-stop-shop" principle for mergers having a "Community dimension". Clearly, in an integrated economic area, it makes little sense to have multiplication of local merger control authorities dealing with the same issue involving companies that are active across political frontiers and in markets that are often wider than national.

43. However, at this stage, we have not yet reached the stage where the world is a fully integrated market. Furthermore, even assuming that it would consist of one market, a number of conditions must be met in order to have a supranational merger control such as a unified legal system (common evaluation rules, rules on solving conflict between national laws etc). Secondly, a global agency would need to be able to enforce or to have enforced its decisions. Thirdly, it would need to have global political legitimacy.

44. Today, a global agency would fail to meet any of these tests. Even in sectors in which global strategies are pursued, competition does not necessarily take place at a global market level. Furthermore, there is no uniform legal system either in terms of substantive test, procedure rules or enforcement action.

45. So, how should cases falling under more than one jurisdiction be tackled? It is clear that international co-operation cannot, and should not, be pursued exclusively by one means alone. It must be taken forward in parallel on both bilateral and multilateral levels. This is the essence of the Commission's policy.

Deepen understanding and compatibility of procedures (current initiatives and the European experience)

46. Based on the EU/US bilateral co-operation model, the EU, in 1999, concluded a competition co-operation agreement with Canada. A similar agreement has recently been signed with Japan. The existing co-operation agreements have proven to be very useful not only at the level of joint analysis and negotiation, but also for avoiding confrontations and co-ordinating enforcement efforts.

47. Indeed, following the bilateral agreement of 1999, there was also increased co-operation with the Canadian authorities on a number of cases. A noteworthy outcome of this strengthened partnership was a series of trilateral EU/US/Canadian teleconferences (e.g. on *Dow Chemical / Union Carbide*), and a trilateral EU/US/Canadian meeting in Washington in the context of proceedings on a specific merger case (*Alcoa / Reynolds*).

48. Turning to the issue of multilateral co-ordination, it is obviously true, as many commentators have said that the increased number of merger control systems in the world produces new challenges. A debate on how to avoid the potential pitfalls that this may create is certainly valuable.

49. There have been numerous efforts to put in place a multilateral framework ensuring the respect of certain basic competition principles by organisations such as OECD, the WTO, and UNCTAD. This must of course continue and will over time contribute to the development of common approaches to global mergers.

50. In addition, a number of competition authorities have already studied the problems in depth and a number of proposals are on the table. Both the European Commission in July 1996 and the International Competition Policy Advisory Committee (ICPAC) in February 2000 have recommended the strengthening of international co-operation amongst competition authorities world-wide. A key recommendation in the ICPAC Report, embraced by the US competition authorities, has called for collaboration among interested governments and international organisations, to create a "global competition initiative" in the words of ICPAC.

51. Commissioner Monti has added to this debate by supporting the creation of a Global Competition Forum, which should be dedicated to the following aims:

- first, to create a forum where those responsible for the development and management of competition policy world-wide could meet and exchange their experiences on enforcement policy and practice;

- secondly, participants should strive to achieve a maximum of convergence and consensus on fundamental issues, such as the substance and economics of competition policy and the enforcement priorities of competition authorities; and

- the Forum should also foster and develop a common world-wide "competition culture," open to dealing with issues of importance to developing economies and economies in transition.

52. The Forum would be intended to complement, rather than rival, other existing organisations. It would be dedicated to promoting the structured dialogue on international competition policy, and is to be set up with the support of antitrust authorities from developed and developing countries

53. While ongoing co-operation efforts towards convergence have produced many worthwhile results, it should be repeated that the success of such co-operation initiatives does not come easily. At times, this framework of co-operation is also quite heavy and its benefits may in some instances appear disproportionate to its costs. Indeed, the success of previous efforts has been dependent on intensive, on-going efforts that are certainly time-consuming – and thus the high costs of such efforts should be

appreciated. Moreover, it should be accepted that there is no programme that suits ideally the needs of all jurisdictions and thus "one size does not fit all." Finally, one should keep in mind that, even in the absence of an agreement, when the pressing interest is there, competition authorities will find a way to co-operate.

54. Merger issues will certainly figure on the agenda of the Forum. In the long run, the success of such efforts is the best hope for reducing transaction costs in our respective merger review processes.

Organisation de Coopération et de Développement Economiques
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English - Or. English

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SUMMARY OF MERGER CASES DESCRIBED BY INVITEES (Session V)

-- Note by the Secretariat --

This note is submitted FOR INFORMATION under Session V of the Forum Agenda.

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English - Or. English

SUMMARY OF MERGER CASES DESCRIBED BY INVITEES

1. For the convenience of all participants, this note contains a brief summary of the merger cases contributed by invitees. It is not anticipated that any of these cases will be formally presented at the Forum, but during the discussion of mergers in Session V some participants may wish to mention and ask about either their own cases or the cases submitted by others.

Bulgaria

2. Bulgaria described the provisions on concentrations in the Law on Protection of Competition and provided two case studies. The Commission on Protection of Competition (CPC) authorizes concentrations that do not create or strengthen a dominant position. Authorisation may also be granted if the concentration aims at modernising production or the economy as a whole, improving market structures, attracting investments, increasing competitiveness on external markets, creating new jobs and better satisfying the interests of consumers. When assessing a concentration the CPC considers whether the advantages outweigh the negative impact on competition on the relevant market. One merger case provided in the submission involved the acquisition of 5% of a firm's capital and the second involved an acquisition that was allowed despite high post-acquisition market shares, due to strong competition in the market and the transaction yielding positive economic benefits. While both involved foreign purchasers, apparently neither raised transnational issues.

- Unicredo Italiano SpA proposed to acquire 93%, and Allianz AG 5%, of the capital of Bulbank Joint Stock Company, a Bulgarian bank. Allianz was already active in the Bulgarian banking market through its control of another bank, but Unicredo did not participate in the Bulgarian banking market. Alliance notified the transaction. The CPC found that the acquisition of 5% of capital did not fall within the scope of the merger control in the law.

- Two insurance operators, "T.B.I. Holding H.B." Ltd, Holland (TBI) and "DZI 2000" Ltd., notified a proposed concentration. A consortium of the two firms (owned 99% and 1%, respectively, by them) would acquire 67% of the capital of "DZI" Ltd. A company in TBI's economic group was the sole provider of "Green Card" system services in Bulgaria. The CPC found the post-concentration aggregate market share to be 50.64% but concluded that there was strong competition on the relevant market. After examining the investment program presented by the consortium, the CPC concluded that the planned concentration could have positive economic effects. It would contribute to the modernization of the acquired company, improvement of the quality of services and enhancement of the competitiveness of DZI. The Commission also considered as important the obligation assumed by TBI to keep, with minimal layoffs, the employees of the acquired firm.

China

3. China made no contribution regarding mergers; its competition-related laws do not provide for merger control.

Estonia

4. Estonia described the competition law provisions applicable to mergers, provided statistics on enforcement, but did not describe specific merger cases. The competition law prohibits concentrations that have as an effect the creation or strengthening of a dominant position, leading to a significant restriction of competition in the relevant market. When the aggregate world-wide turnover of the parties involved in a proposed concentration exceeds a specified threshold, the concentration must be notified to the Estonian Competition Board. In 2000, the Competition Board analysed 29 notified concentrations.

Indonesia

5. Indonesia made no contribution regarding merger control.

Kenya

6. Kenya placed merger control in its institutional setting in the overview, and summarised three merger cases. "The principal objective of Kenya's Competition Law is to encourage competition in the domestic market by…regulating concentrations of unwarranted economic power…." Specifically, the Minister is mandated by the law to keep the structure of production and distribution of goods and services under constant review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages. Two of the three merger cases summarised by Kenya involve transnational mergers that would have had a negative effect on competition in Kenya; the third involves a series of take-overs by a foreign company that vertically integrated the sector.

- In January 2000, Agip agreed to sell to Shell (and British Petroleum) all of its equity in its subsidiaries in five African countries (Kenya, Uganda, Eritrea, Ethiopia and Côte d'Ivoire). The Commission contacted relevant government agencies and a number of third parties active in the oil industry, but it is unclear whether it sought information across national borders. The Commission found that the proposed acquisition would substantially injure competition in the production and supply of liquefied petroleum gas (LPG) and the use of track loading arms for white oils in Mombasa and Nairobi. The Parties were asked to propose how Agip's LPG and track loading facilities in Nairobi and Mombasa could be restructured after the acquisition so as to minimise anti-competitive effects. The Minister for Finance approved the acquisition subject to disposal of LPG and loading arms facilities within one year following the acquisition.

- Kenya has three cement manufacturing companies—Bamburi Cement Ltd., EAPCC, and ARM—which supply about 50%, 40%, and 10%, respectively, of domestic consumption. In June 2000, Blue Circle Industries Plc (BCI) applied for authorisation to acquire shares in two of the companies. Bamcem is a holding company owned by BCI (40% of total), La Farge (40%) and Costal (20%). Investigation revealed that the proposed transaction would result in Bancem and its principals, BCI and La Farge, owning 72%, 52% and 21% in Bamburi, EAPCC and ARM respectively. The transaction would give Bamcem and its principals substantial influence over all three cement manufacturing companies in Kenya. Thus, the Minister for Finance rejected the application for authorisation.

- Before 1995, Coca Cola, Pepsi and Schweppes competed to supply carbonated soft drinks in Kenya. By the end of 1995, Coca Cola sold 95% of the carbonated soft drinks in Kenya and the vast majority of bottlers bottled Coca Cola. Coca Cola International decided to take-over

each of the eight Coca Cola bottling plants in Kenya through its subsidiary company, Coca Cola SABCO. In September 1997, Coca Cola SABCO applied for authorisation to acquire Flamingo Bottlers of Nakuru. Following investigation, the Minister of Finance approved the application subject to certain conditions. Coca Cola SABCO appealed the conditions, and the investigation is on-going.

Latvia

7. Latvia described two merger cases, both evidently involving only domestic firms. Under the competition law, mergers are notified to and reviewed by the Competition Council. In 2000, the Council investigated three mergers. One merger involved one party with a 4% market share; the other merger was found to strengthen a dominant position but to involve parties who did not meet the merger notification threshold.

- "Staburadze" acquired decisive influence over "Laima." The parties manufactured and sold a variety of confectioneries in Latvia. The relevant market was defined as the market for the sale of caramels and *dragée* in Latvia. One party had a 4% share of the relevant market. The Competition Council received information from the merging parties, their competitors and their suppliers, although it is unclear whether any of this information was obtained abroad. The Council concluded that the merger would increase competitiveness in the local and international markets and stimulate export production. The Council did not find any circumstances that would allow consumers to be harmed by the transaction. The merger does not significantly increase concentration in the relevant market. Other market participants, questioned as part of the evaluation process, felt that the merger will not increase the market power of the merging parties. The Competition Council concluded that possible benefits exceeded possible harmful effects from the merger, and allowed it.

- The Competition Council was notified of the sale of 85% of the stock in "Preses Apvienîba" to "Narvesen Baltija." The Council sought and received additional information from the parties and market participants, the Latvian Association of Press Publishers, and several publishers of newspapers and periodicals in rural areas. On the basis of this investigation, the Council concluded that: (1) "Preses Apvienîba" had a dominant position in both retail and wholesale distribution of newspapers and periodicals; (2) "Narvesen Baltija" is active in the retail distribution of newspapers and periodicals; (3) retail and wholesale distribution were distinct products; (4) "Preses Apvienîba" has the possibility to conclude purchasing-selling agreements on more favourable conditions than its competitors, and (5) aggregate turnover of the two firms in the previous year was less than 25 million lats. The Council concluded that the transaction would strengthen the market power of "Preses Apvienîba". However, the Council stated that the parties were not obliged to notify the merger since the combined turnover was below 25 million lats. Due to the transaction's possible harmful effects on competition, the Council will monitor the merged undertaking's activities.

Morocco

8. Morocco made no contribution regarding merger control.

Peru

9. Peru made no contribution regarding merger control.

South Africa

10 South Africa provided a statistical summary of its merger review and overviews of several mergers. During the period 2000 to 2001, the Competition Commission received 407 merger notifications. The Commission included overviews of two mergers and a joint venture; of the three, two involved foreign firms with assets in South Africa. The Tribunal provided two decisions on domestic mergers, one regarding a vertical merger and the other a merger of retailers active in a wide range of products.

- Glaxo Wellcome and SmithKline Beecham proposed to merge. Competition concerns were raised in the private sector segments for two therapeutic categories, topical antibiotics (D6A) and anti-virals, excluding anti-HIV (J5B). The parties to the merger agreed to license specified products in these therapeutic categories, under terms and conditions set out in the agreement. This addressed the competition concerns and the merger was subsequently approved.

- Two sugar companies, Tongaat-Hulett Group and Transvaal Suiker Beperk proposed to merge. The law governing the sugar industry is expected to be substantially revised to promote rivalry in the domestic sugar market. Thus, the merger was evaluated both for its effect under current rules—where competition and incentives for competition are limited if not absent—and under potential future conditions of competition. The Commission recommended the merger be prohibited.

- Three major oil companies, Shell, BP and Caltex, and Trident Logistics proposed a joint venture. The proposal was subsequently withdrawn. The three oil companies would form Trident to manage, contract, and provide logistical support for supply and distribution, including services associated with refining, storage and handling at depots, pipeline, rail, ship and road transport. The Commission found that competition was likely to be substantially lessened in the markets for product exchange and hospitality services.

- Schumann Sasol (South Africa) (SCHS) proposed to buy Price's Daelite (PD). This would return the parties to the situation they were in before 1995. PD is heavily indebted to SCHS. The parties and the Competition Commission agreed that the two relevant product markets are the market for candle wax (which SCHS supplies) and the market for household candles (which PD supplies). They also agreed that the relevant geographic market is South Africa. The substitutability of various types of waxes and their blends for making household candles were considered. The merging parties had, respectively, 75% and 42% of their respective markets. SCHS is the exclusive supplier of wax to candlemakers with aggregate market share of 66%. An import tariff on candles of 20% limits total candle imports (there is no tariff on candle wax). While there are possible substitutes for candles—oil lamps and electricity—as a practical matter a large part of the population, especially the very poor, rely on candles for primary lighting. The Tribunal rejected the merger as anti-competitive. Market conditions were "ripe for competitive entry into the candlewax market," and the merger would raise barriers to entry by removing a large buyer—PD—from the set of possible wax buyers. It was further found that the transaction would facilitate PD extending its powerful position in the candle market. The Tribunal rejected the parties' failing firm defence, considered the effect of the merger on export competitiveness, small business, and employment, noting that "it is the

poorest consumers who consume candles—accordingly, the public interest loss would have to be considerable and certain in order to justify" approval, and rejected the merger.

- JD Group (JD) would acquire control of Ellerines Holdings (EH). These firms are two of South Africa's best known retailers, with several hundred stores each. Defining the relevant product market was contentious, with the Commission holding the view for a consolidated product market (furniture and appliance retailers serving specified customer segments) and the parties for disaggregated product markets (furniture, bedding, white goods, brown goods and two other goods irrelevant to the analysis here). They also disagreed on relevant geographic markets: a set of local markets vs. a national market. They agreed that the competition concern was limited to sales on credit. The Tribunal, referring to *Federal Trade Commission v. Staples* and *Brown Shoe v. United States*, used "practical indicia" and found that the retail format used by JD and EH, "furniture stores," segmented the market from large appliance discounters. The "practical indicia" by which the formats differed were type of location, pricing strategies, approach to credit, and range of goods offered. "Level of customer service" was also mentioned. The Tribunal further found that the parties set price and trading terms nationally, and do not set them in response to competition from local independent retailers. Thus, the Tribunal found the relevant market to be "sale of furniture and appliances on credit to consumers in the LSM3-5 category [Living Standard Measures, profiles of consumers according to various living standards criteria] through national chains of 'furniture shops.'" The Tribunal examined various measures of market structure, as well as the nature of competition in the market and barriers to entry, and found that the merger would likely substantially lessen competition in the relevant market. The Tribunal examined a divestiture agreed between the Commission and the parties, but found that it would not meet its concerns.

Romania

11. Romania's contribution describes the competition law provisions applicable to mergers, provides statistics on enforcement, and describes two sets of mergers. The competition law prohibits economic concentrations that have as an effect the creation or strengthening of a dominant position, leading or likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it. In 2000, the Competition Council analysed 237 economic concentrations, a large increase over 1999 both absolutely and relative to other types of cases analysed. Of the 7 decisions following investigations of notified concentrations in 2000, two authorised the concentration, 3 authorised subject to conditions, and 2 rejected the concentration. Where the aggregate turnover of the parties involved in a proposed economic concentration exceeds a threshold, the concentration must be notified to the Council.

- Tubman (International) Ltd acquired around 70% of the social capital of, respectively, SC Silcotub SA Zalau, SC Laminorul SA Braila and SC Petrotub SA Roman. The Competition Council approved the first two acquisitions, where the firms did not supply the same markets, but prohibited the third. The third acquisition would have resulted in the firm having a share of the relevant market (unsoldered tubs) over 76%. Tubman would have held a dominant position on the relevant market, resulting in a significant restraint of competition and the possibility to eliminate competitors. This possibility would have been facilitated by the fact that SC Petrotub SA Roman is the sole producer of unsoldered big tubs, this aspect permitting the use of cross subsidies. For these reasons the Competition Council prohibited this economic concentration. The decision was appealed to the Bucharest Court of Appeal, which sustained it. The decision of the BCA was not appealed.

- In 2001, the Competition Council investigated the take-over by Compagnie Financiere Michelin of Tofan Holding SA . Tofan is a Romanian producer and nation-wide distributor of tyres. The relevant markets were found to be motor car tyres and truck tyres. The concentration would result in MICHELIN having market shares of 58.91% and 56,50% respectively. Custom duties should decrease, according to agreements to which Romania is a part. Access to the tyre markets is facilitated by the lack of barriers to entry. The concentration would accomplish the cumulative conditions of art.14(2) a) ,b), c) of the Competition Law and consumers will benefit from lower real prices as a consequence of investments. The Competition Council authorised the concentration, with conditions.

Slovenia

12. Slovenia described merger review in the overview and, generally, concentrations in the retail, media and chemical sectors. Timely notification of a concentration must be made based on aggregate turnover in Slovenia or on market share. Concentrations are evaluated to determine whether they threaten to create or strengthen a dominant position as a result of which effective competition could be excluded or significantly impeded. Effective competition is determined by market characteristics such as its structure, openness of the market to new entry, the behaviour of undertakings and of other participants in the market, and the effects of such behaviour. The effects of concentrations are analysed on the relevant product and geographic market. In 2000, the Competition Protection Office issued 39 decisions on notified concentrations. Of these, four notified concentrations were found to be outside the scope of the Act, 31 were found to be compatible with the competition rules and four were approved with conditions.

- The retail sector concentrations involved a series of acquisitions by one firm, as well as some other consolidations of competitors. Other concentrations concerned publishing, the distribution of books, stationary and office equipment, and television broadcasting. Concentrations in chemicals tended not to involve direct competitors.

Chinese Taipei

13. Chinese Taipei mentioned merger review in its overview and submitted one merger case study. In general, the Fair Trade Law permits mergers, but mergers involving parties reaching a certain size must apply to the Fair Trade Commission (FTC) for approval. During the period 1992-2000, the FTC received 4,832 merger applications. The merger described involved two domestic cable television (CATV) companies.

- Ch'un Chien CATV Co., Ltd. applied to take over the major assets and operations of Wei Da CATV Co., Ltd. The merging parties compete in the same market district. The resulting firm would have had more subscribers than was envisaged when the districts of operation were drawn for CATV operators. Investigation revealed that direct satellite broadcasting was not a good substitute for CATV due to differences in the type and number of channels they provide and the fees they charge. The merger would not have benefited upstream content providers or consumers, nor would it have promoted cross-business operations. Entry was found to be slow—three years or more. The transaction was found to not have significant economic benefits and to cause significant disadvantages through restraint of competition. The Commission rejected the transaction.

Thailand

14. Thailand describes the law applied to mergers and one case of merger to monopoly of domestic regulated companies. Any merger that may create monopolistic power or reduce competition is prohibited under the law, unless the Competition Commission permits it where the merger is necessary in the business and beneficial to the economy.

- The two cable television companies merged to become the sole cable television (CATV) operator. The merged company, in financial trouble due to the depreciation of the Baht, raised the fee of service packages and reduced the number of programs. The adjustment of service packages and monthly fee is under the approval of the Mass Communication Organisation of Thailand (MCOT) which is also the institution that grants CATV concessions. The Competition Commission ordered the Competition Secretariat to determine whether the merged company is a state-owned enterprise and to ask MCOT to monitor the company's fees and offerings of service packages in order to provide more alternatives to consumers. If the merged company is found to be a state-owned enterprise, it will be excepted according to the Competition Act.

Ukraine

15. Ukraine contributed a discussion on international co-operation, one part dealing with mergers, statistics on merger review and a description of two groups of merger cases where a foreign firm acquired domestic firms. In the discussion on international co-operation, Ukraine indicated that multilateral international co-operation is required to develop a mutually acceptable conception scheme of international rules of competition in the sphere of mergers. Thorough study is important in the present stage. Mechanisms to settle disputes are necessary from the outset.

The Ukrainian law applies to economic concentrations, and these must be notified if they exceed asset or sales thresholds. In 2000 the Committee considered 697 applications for consent to economic concentrations. In 436 cases it gave its consent, whereas in three cases it refused. A significant fraction of potential buyers submitted applications in advance. In 2000, nearly 60% of applications considered were submitted by foreign economic entities.

- *Interbrew RGN Holding B. V.* (Netherlands) applied for the Antimonopoly Committee of Ukraine's consent to two transactions, (1) purchase of a controlling stake in *Pyvzavod "Rogan"* and (2) purchase of a controlling stake in *Oleksandriisky Pyvzavod*. *"Rogan"* and *Oleksandriisky* supplied national markets of beer and non-alcoholic refreshing drinks. Their market shares were below 35%. *Interbrew*, however, already controlled other Ukrainian breweries whose joint share in the Ukrainian beer market exceeded 20%. A more detailed investigation was ordered, and information was gathered from bodies of state power, economic entities, consumers, *et al*. The detailed investigation confirmed that the transaction would establish a monopoly position (i.e., share of a relevant market over 35%) on the national market of beer and that the market would be highly concentrated. Officials recommended the Committee refuse its consent. *Interbrew* offered to sell another Ukrainian brewery it controlled. Meanwhile, *Interbrew* agreed to make certain investments in malt and brewer's barley in Ukraine. The Committee consented to the proposed purchases and legally obliged *Interbrew* to fulfil its pledges regarding the disposal of the other brewery.

– *Chodoslovenske Energeticke Zavody* (CEZ) (the city of Kosice, Slovakia) asked the Antimonopoly Committee of Ukraine to consent to its purchase of three regional power companies in Ukraine, *Kirovogradoblenergo*, *Sevastopolenergo* and *Khersonoblenergo*. CEZ had earlier purchased *Zhytomyroblenergo*. The regional power companies each operate on two markets. First, they supply local electric power markets where they use local power networks and occupy a monopoly position on those markets as subjects of natural monopoly. Second, they supply the national market of electric power where, subject to a regulated tariff, have such an insignificant market share that they do not occupy a monopoly position either jointly or individually. The Committee was informed that Ukrainian Energetic Partnership (Wilmington, Delaware, USA) was providing financial assistance to CEZ for the purchase, and determined that the conditions of this assistance would not transfer control from CEZ. The Committee granted its consent to the purchases.

Venezuela

16. Venezuela made no contribution regarding merger control. According to Article 11 of its law, "Economic concentrations are prohibited, especially if they arise from the exercise of a single activity, when as a consequence of this activity free competition is restricted or a situation of dominance results in the market or in any part of the market."

Zambia

17. Zambia provided statistics on merger enforcement and described two merger cases involving domestic and foreign firms and having transnational effects. In 2000, the Board of Commissioners took 48 merger/take-over decisions, and the Zambia Competition Commission closed 22 merger/take-over cases, representing 47% of all cases closed. In both of the cases described, the dominant supplier in Zambia (of, respectively, cement and sugar) was acquired by a potential supplier with plants in neighbouring countries.

– Fifty one percent of Chilanga Cement Plc was sold to Lafarge SA of France by Pan African Cement (PAC), a subsidiary of the Commonwealth Development Corporation. Cement plants in Tanzania and Malawi were part of the same transaction. Chilanga Cement supplies over 50% of cement consumed in Zambia. Lafarge already owned cement plants in Zimbabwe and South Africa, but did not supply Zambia from them. Thus, it was established that the parties were not in direct competition in Zambia. However, the Lafarge plants in Zimbabwe were seen as a potential source of competition to supply Zambia. In addition, there was concern that Lafarge could close the Zambian plant, raising grave public interest issues including adverse effects on the employees, ancillary local enterprises and national trade. Prior to this transaction, ZCC had reports suggesting that Chilanga Cement was abusing its dominant position through excessive pricing and market sharing within the PAC group of companies. The effect of the market sharing was to prevent the sale of Zambian cement in Burundi, formerly its main market. Burundi, Zambia, and Malawi are members of the COMESA Free Trade Area, but Tanzania is not. In its report, Zambia noted that Malawi and Tanzania do not have competition laws, and stated that, "In the absence of a regional competition framework, any efforts to regulate behaviour of transnational corporations at the regional level were futile."

- Illovo notified the ZCC of its acquisition of over 50% of Zambia Sugar (ZS) from T&L. ZS produces 96% of the sugar produced in Zambia. Illovo is Africa's leading sugar producer, with interests in Malawi, Mauritius, Mozambique, South Africa, Swaziland and Tanzania. The transaction increased Illovo's share of regional sugar supply from 35% to 39%. The transaction could remove a potentially vigorous and effective competitor in the regional market, but the take-over was found not likely to lead to the restriction, prevention or distortion of competition in the relevant market (Zambia). The Board of Commissioners authorised the transaction.

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CONTRIBUTION FROM AUSTRALIA

-- Merger Review - Cooperation in Transborder Transactions (Session V) --

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CONTRIBUTION FROM AUSTRALIA

MERGER REVIEW - COOPERATION IN TRANSBORDER TRANSACTIONS

-- (Session V) --

1. Introduction

One of the most significant features of the world economy over the past decade has been the increasing liberalisation of trade and the consequent globalisation of industry. Worldwide integration of finance and investment continues as trade expands. An associated feature of these developments has been the growth of international mergers.

There are a number of issues which competition agencies are confronted with as a result of international mergers. It would seem that increased co-operation between the competition agencies of various countries affected by international mergers would be desirable. Already a range of mechanisms exists to facilitate co-operation and co-ordination between competition authorities.

Bilateral and multilateral arrangements are an increasingly important mechanism for co-operation between regulatory agencies seeking to combat emerging cross-border issues as a means of formalising co-operation, particularly to create a means for the exchange of confidential information. Bilateral agreements now tend to include not only a traditional comity provision, by which each party is required to consider the important interests of the other in certain circumstances, but also provision for positive comity, by which one party can request that the other initiate an investigation or enforcement proceedings for anti-competitive behaviour in the latter's territory that adversely affects the former's interests. Such a provision is particularly concerned with avoiding any disputes over the propriety under international law of assertions of extraterritorial jurisdiction. However often these co-operative agreements have limited or no application in respect of international mergers.

Sometimes competition agencies in smaller countries may feel that there is little they can do to stop the negative impact in their country of an international merger. It is important that each country be able to examine the impact of a merger in the context of its own market structure.

2. Globalisation

By world standards Australia is relatively small part of global markets. Yet the smallness of its economy and the already high levels of concentration in most markets may make international mergers more of a problem in relative terms.

Australia therefore has concerns about the potential for an international merger to be approved in other, larger jurisdictions, making it difficult for the merger to be blocked in Australia if it has anti-competitive consequences.

However, to date, few such problems have arisen. Firstly, most global mergers are not anti-competitive, but are a logical response to the process of globalisation, substantial international trade and low barriers to entry through imports. Secondly, anti-competitive mergers are likely to be blocked

overseas. Thirdly, where a merger is acceptable in other countries, but is anti-competitive in Australia, solutions have been found, for example, the Rothmans / British American Tobacco (BAT) merger (outlined below).

Rothmans / British American Tobacco

The acquisition of the Rothmans group by British American Tobacco provides a useful example of a number of issues in international mergers. In some countries the merger of these two cigarette companies did not generate competition concerns.

In Australia the market was highly concentrated. Three companies had 99 percent of the Australian cigarette market. The market share of the merged companies would have been around 65 per cent.

There was agreement that the boundaries of the market were manufactured cigarettes. Pipe tobacco, cigars and loose tobacco for roll-your-own cigarettes were not seen as close substitutes. While the major firms in the cigarette market were international, with operations in many countries, the market was not international. In the Australian market, imports accounted for less than one per cent of the market.

The Australian Competition and Consumer Commission (ACCC) took the view that in Australia the merger would lead to a substantial lessening of competition in the cigarette market. The merger parties were informed that the ACCC would oppose the merger.

While the merger went ahead in a number of countries, the merger parties entered into negotiations with the ACCC to undertake certain structural remedies. As is the case with competition authorities worldwide, the ACCC has a preference for structural remedies which might enable long term competitive outcomes rather than behavioural undertakings such as price controls.

The merger parties agreed to divest certain cigarette brands and production and distribution facilities to an amount equal to seventeen per cent of the total market. The major international tobacco company, Imperial Tobacco, purchased the assets, and has subsequently increased its market share. The merger went ahead while competition in the domestic market was retained.

Often the ACCC hears about major international mergers from the media. In some instances, the ACCC has contacted local subsidiaries of the merging parties and requested information relevant to the analysis.

It is also not uncommon for the parties to an international merger to seek approvals from competition authorities on a deliberately sequential basis. The sequence is not necessarily always the same. In some instances parties seek approvals from the Economic Union (EU) and United States (US) competition jurisdictions before approvals from agencies in smaller countries. In other instances the merger parties have begun to seek approval in those jurisdictions where the mergers appear to have the highest potential anti-competitive impact.

Sequential notification can be of concern to smaller countries. Quite often the large economies with extensive international trade do not have the concentrated market structures which are characteristic of smaller economies or those in the early stages of liberalisation. There may be attempts by the merger parties to establish a momentum of approvals from larger economies before approaching the regulatory agencies of the smaller economies and those who are fairly new to competition and merger law and policy.

In these circumstances international co-operation between competition agencies can be particularly valuable. Agencies can 'compare notes' on matters such as market definition and barriers to entry in the industry under investigation. They can also assist each other with basic information collection from domestic public sources. For many smaller competition authorities resource constraints and the increasing technological complexity of some industries mean this is a valuable tool. However, the insights of investigations and decision makers in other jurisdictions are merely a point of reference given local market circumstances, judicial precedents and legislation.

Differences in merger legislation in various countries may lead to different conclusions as to whether the merger should be opposed, even when the key elements of the market definition are similar. For example Australia has a 'substantial lessening of competition' test for mergers while until a few months ago, New Zealand, our nearest neighbour, and a country with many of the same international firms operating in its economy, had a test of 'market dominance'. Consequently, even if both countries adopted identical views on market definition and barriers to entry, an international merger would have been more likely to be approved in New Zealand than in Australia, given their less stringent competition test.

Addressing this issue from another angle, countries do not need to have the same or similar merger tests in order to gain substantially from co-operation on international merger matters.

Geography may also play a significant part in bringing about a different result in different countries, even when they adopt a similar approach to market definition. In particular, imports may often prove to be a more important competitive constraint on merger parties in one country which is contiguous with another, compared to the situation in Australia and New Zealand where imports are sourced from relatively distant markets.

It is also relevant to note that co-operation in the analysis phase will assist with co-operation in the remedial phase. If there has been a consistent view developed between competition agencies as to the nature of the problems that the merger might generate, it is more likely that consistent remedies will be applied.

Apparent differences between countries' market structure and/or legislative requirements are sometimes acknowledged by companies structuring transnational mergers to operate in some jurisdictions but not in others. An example of this was the Coca-Cola/Schweppes merger in 1999 which was generally not well received in the jurisdictions in which it was proposed, and not attempted in others (outlined below).

Coca-Cola / Cadbury Schweppes

A proposal by the Coca-Cola Company to acquire the international soft drink brands of Cadbury Schweppes was not attempted in those countries where the merger parties considered that the merger would breach the local competition law.

Australia was a country where the two firms did propose to merge. In Australia, Coca-Cola was the largest soft drink company with a market share in excess of sixty per cent. It had the most extensive distribution network via supermarkets and non-supermarket outlets such as clubs, hotels, small convenience stores, vending machines, and fast food outlets. The Schweppes soft drink brands were the second largest with a market share of around fifteen per cent. Pepsi Cola was a distant third with around seven per cent of the market.

The initial merger proposal was rejected by the ACCC. Coca-Cola then attempted two variations of the merger proposal, involving divestiture of local brands owned by the merging parties. However the principal concern was the acquisition by Coca-Cola of the international Schweppes brands. Coca-Cola was unwilling to divest the very assets which were the purpose of the acquisition. Consequently, despite extended negotiations between the ACCC and the parent companies of Coca-Cola and Cadbury Schweppes, it was not possible to achieve a satisfactory outcome and the acquisition was abandoned.

3. Australia's co-operation arrangements

Australia's most significant co-operative arrangement is the Treaty that exists between the Government of Australia and the Government of the United States of America (US) on mutual antitrust enforcement assistance. The agreement imposes legal obligations to assist each other in the conduct of competition law investigations through the exchange of evidence on a reciprocal and confidential basis. Its application to mergers, however, is very limited due to constraints on the disclosure of commercial information provided by the merging parties.

The assistance available under the Treaty includes:

- obtaining antitrust evidence on behalf of the other agency (including taking witness statements); obtaining records, documents and other evidence; locating or identifying persons or things; and executing searches and seizures;

- disclosing, providing, exchanging, or discussing antitrust evidence; and

- providing copies of publicly available records or information in the possession of government departments or agencies.

The Treaty was signed on 29 April 1999 and built upon an earlier agreement between Australia and the US, of 29 June 1982, and deals with notification requirements, consultations, confidentiality and cooperation in antitrust enforcement. The 1999 Agreement is consistent with existing Australian legislation that governs the provision of assistance by Australian authorities to overseas authorities, for example, the *Mutual Assistance in Criminal Matters Act 1987* and the *Mutual Assistance in Business Regulation Act 1992*. However, the development of a Treaty between our two Governments was necessary for the US to provide enforcement assistance to Australia as a result of requirements in the US *International Antitrust Enforcement Assistance Act 1994*.

The ACCC has a tripartite co-operation arrangement in place with the New Zealand Commerce Commission and the Canadian Competition Bureau to promote co-operation and co-ordination in the application of each agency's respective competition and consumer laws. It also has bilateral agency based arrangements with the Taiwan Fair Trade Commission and the Consumer Affairs Council of Papua New Guinea, also covering both competition and consumer protection regulation. Unlike the substantive agreement with the US, these bilateral agency based agreements provide for co-operation, including on mergers, but do not provide for the exchange of confidential information and have other safeguards in place.

In relation to consumer protection matters, the ACCC signed an agency-based co-operation arrangement with the US Federal Trade Commission on 17 July 2000 to address consumer protection issues such as cross border Internet fraud.

4. Australia's experience of co-operation in the context of transnational mergers

In recent years there has been a growing level of co-operation between Australia and foreign competition agencies on antitrust and consumer issues. This has assisted in competition law enforcement, including for example, a successful action against collusion in the vitamins industry and in concerted action on matters involving the Internet.

Since 1995-96 there has been a steady annual increase in the number of mergers as a whole considered by the ACCC from 117 to 265 in 2000-01. The ACCC has only recently begun statistical analysis of mergers with international aspects, but clearly there has been an increase in transnational mergers particularly in the pharmaceuticals, media, mining and finance industries.

Requests for information have also included information about foreign merger law and decision making, particularly on market definition issues. Of particular value to the ACCC in this regard has been information regarding the deregulation of energy industries in the United Kingdom and US.

There are a number of ways in which mergers involving offshore companies can have an effect in Australia. In one scenario, there may be anti-competitive consequences in Australia by bringing together two entities offshore which have Australian subsidiaries. Such mergers may be reviewed under section 50 or section 50A of the *Trade Practices Act 1974* (TPA), the merger provisions of Australia's competition law.

In other situations, acquisitions may occur which are beyond Australian jurisdiction, but have effects which would otherwise raise issues under the TPA. For example, an overseas entity may own a company which is the dominant producer in a market of a product and that entity may then acquire the major source of imports of that product – a foreign company. Such a transaction may be beyond the jurisdiction of the country in which it has an effect on competition and also not offend the competition laws in the country in which the transaction occurs.

The result of these issues is that the ACCC makes contact with overseas agencies on mergers on a fairly regular basis. Essentially this is to 'compare notes' on matters such as market definition and barriers to entry in the industry under investigation. While circumstances may differ from country to country, the insights of investigations and decision-makers in other jurisdictions give a point of reference for work done in Australia. It is very useful to know what action other jurisdictions are taking on the same merger, and valuable to test any differences in approach or findings. Much of this contact is currently undertaken on a relatively informal, officer to officer, basis.

There are a variety of possibilities for further enhancing international co-operation between agencies in the consideration of mergers, including:

- the sharing of confidential information;
- the provision of technical assistance;
- increased exchange of views on the same or similar issues;
- increased notification between agencies of cases which are of concern to other agencies; and
- implementing mechanisms whereby authorities can agree on jurisdiction.

The types of information usually exchanged include:

- information about market definition;
- information regarding whether any serious issues appear to be arising in the matter; and
- information as to the timing of investigations and the final decision.

In the ACCC's experience, its counterparts have not expressed many inhibitions about disclosing this sort of information to other competition agencies. Outlined below are details of a number of cases where the ACCC has co-operated with its international counterparts.

Grand Metropolitan / Guinness

The ACCC held a number of telephone conferences with regulators in the EU, US, Canada and Mexico. There was particularly useful discussion on the 'product aspect' of market definition which included alcoholic beverages, spirits and individual categories of spirit as possible options. There was also useful discussion about the timing of the investigations and when decisions were proposed to be made in the different jurisdictions.

De Beers / Ashton Mining Limited

In assessing this proposed acquisition the ACCC liaised with the Canadian, United States', and European authorities. Liaison with the European Commission (EC) was particularly extensive and useful, allowing the ACCC to develop a better understanding of the global trade in diamonds, most of which takes place in Belgium.

Metso / Svedala

Contact with overseas jurisdictions was also used extensively in the assessment of the global rock and mineral processing equipment merger between Metso and Svedala. In this case, the EU obtained divestiture orders from the parties which greatly reduced the anti-competitive impact of the transaction upon Australian markets. Liaison between competition agencies therefore resulted in the expeditious consideration of this matter by the ACCC.

Alcoa / Reynolds

The ACCC liaised extensively with the EU and US competition authorities in respect of the global aluminium merger of *Alcoa* and *Reynolds*. This case raised competition concerns with the ACCC, the European Commission and the US Department of Justice (DoJ). To satisfy concerns, Alcoa offered undertakings to the DoJ and the EC in this case to divest itself of its interest in an alumina refinery in Australia. These undertakings were also sufficient to allay the concerns of the ACCC. The ACCC's recognition of undertakings given to other competition authorities by merger parties as an effective remedy shows that cooperation between competition authorities can lead to very effective outcomes.

Gillette / Wilkinson Sword

In 1990 this acquisition was considered by fourteen competition agencies around the world, including Australia. The merger had a different impact in each of the various jurisdictions, largely due to differences in the economic structure and merger laws of the various countries. The ACCC found it very useful to be able to discuss market issues and exchange views with its counterparts during the course of its investigation of this merger.

In Australia the merger would breach the competition law. While the merger went ahead in a number of other countries, Australia required the Wilkinson Sword razor brands to be divested to a non-related party.

The longer term outcome has not been particularly successful. The Wilkinson Sword brands have declined in popularity as Gillette technology, branding and advertising has increased the Gillette market share. It would seem that divestiture in one market after a global merger may not achieve the desired competitive outcome unless, as in the Rothmans / BAT cigarette example, the divested assets can be sold to a major market participant. Of course this is not unique to divestitures resulting from international mergers. The same is true of domestic mergers. However in the case of international mergers it is not possible for one country to block the merger in all possible markets. So the bargaining power of a single competition agency in a smaller country may be more limited than in domestic merger cases.

5. Confidentiality considerations

In Australia, information gathered from industry participants through market inquiries is crucial to the consideration of merger proposals and is held in the strictest confidence by the ACCC. The ACCC relies extensively on this information and recognises that there is a need to protect the confidentiality of information provided by organisations and individuals. This confidential relationship needs to be considered whenever an agreement for the sharing of confidential information is implemented across jurisdictions.

Waiver of confidentiality by the parties to a merger to enable competition agencies to share information, and therefore facilitate the merger approval processes around the world, would be a positive and constructive step toward streamlining global merger processes. Further, willingness by the merger parties to allow their confidential submissions to be shared with other competition agencies may create some scope to reduce their administrative and processing costs.

In the Alcoa / Reynolds merger discussed above, the parties provided a confidentiality waiver so that the Australian, US, Canadian and EU competition authorities could consult with each other.

6. Concluding remarks

With the emerging trend toward globalisation, competition regulators are increasingly faced with borderless competition and enforcement issues. As such, competition authorities must progressively deal more and more with the complex enforcement issues associated with international cartels and global mergers.

In an effort to combat and seek solutions to these new issues, the ACCC is liaising to a greater degree with its international counterparts and formalising its relations with a number of its counterparts

through entering into co-operation arrangements. The ACCC will continue to seek to enter further similar arrangements with other competition regulators in the future.

At this stage Australia has not formed conclusions about more ambitious possibilities for the co-ordinated treatment of mergers on a global scale. It believes there is a case for greater co-ordinated treatment of mergers on a global scale. It is important however, that particular circumstances and the impact of a particular merger in smaller economies such as Australia need to be taken into account in any co-operative arrangement that may emerge in coming years.

Organisation de Coopération et de Développement Economiques
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OECD Global Forum on Competition

CONTRIBUTION FROM MEXICO

-- Merger enforcement in Mexico (Session V) --

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MERGER ENFORCEMENT IN MEXICO

I. STATUTES' BACKGROUND

Article 28 of the Constitution of Mexico (Constitution) prohibits monopolies, barriers to trade, and other monopolistic practices that limit or restrict competition and free market access.

During decades this remarkable vision was neither taken advantage of nor put into practice by those responsible for applying the constitutional mandate. The failure to apply this constitutional provision had undesirable consequences for Mexico's well-being and national economic progress. Among other examples are the well known episodes of financial uncertainty experienced in Mexico since the late 70's, episodes produced by series of internal economic and political situations, which along with non-favorable international events, negatively affected growth and promoted macro and micro economic imbalance. In this scenario high concentration of productive activities, investment and savings, affected also the economic cycle, not to mention its effects on income distribution.

As a result of the aforementioned experiences, since the early 90's Mexico has been involved in a deep process of structural reforms with the aim to change the functioning and operation of its economic system from a state controlled, closed and over-regulated economy to one privatized and open to trade and competition.

The economic model that Mexico chose, relies significantly on market forces. Trade liberalization and regulatory reform have a central position in economic policy aimed at strengthening the role of market forces and the incentives for private investment. It was recognized that in competitive markets, production and quality of goods and services is larger than in monopolized or highly concentrated markets; prices are lower and that economic inefficiencies not only restrict the competitiveness of our companies but also hamper social and consumer well-being.

Mexico widely recognized the benefits of market economies and the positive effects of competition. However it was considered that the operation of free market principles does not imply the elimination of all participation of the authority in economic activities. From our perspective, free market principles imply some supervision in order to preserve market mechanisms.

The promotion of competition and efficient market structures needed a specific institutional arrangement, and thus in 1993 the Federal Law of Economic Competition (FLEC) [1] was enacted, and a specialized and autonomous agency, the Federal Competition Commission (FCC), was created to enforce it.

Currently, competition policy is an indispensable and effective element of economic policy. Together with trade liberalization and regulatory reform, the application of a competition legal framework has contributed to enhance economic activity, create investment opportunities and foster market efficiency.

Competition policy reduces entry barriers to private investment and induces better market structures. It promotes the permanence of efficient investors and the development of smaller companies, by

[1] The FLEC and the Regulation for the implementation of the FLEC can be consulted at the FCC's homepage http://www.cfc.gob.mx. Other relevant information regarding the enforcement of the FLEC are also available at that website.

removing anticompetitive conduct carried out by agents with market power in order to monopolize markets. These outcomes emphasize the need to persist in promoting competition and eliminating the restrictions which still prevail.

Companies merge for different reasons: to adapt to economic environment, to enhance their efficiency or financial position, to diversify their activities or to control vertically integrated activities, among other causes. Most of this transactions are neutral or beneficial from a competition perspective. However some transactions may imply a risk for the markets and competition processes.

The possibility to prevent anticompetitive mergers is undoubtedly a valuable tool aimed to promote attractive market structures for new investments and to foster industrial and commercial efficiency.

The strict application of the FLEC occupies a key place in the economic strategy and policy of the Mexican government since 1995

II. THE FEDERAL LAW OF ECONOMIC COMPETITION

In 1993 the FLEC was issued to enforce article 28 of the Constitution. The FLEC expresses the permanent goal of competition policy, to safeguard and promote competition and free market access, in order to help raise the efficiency and productivity of the Mexican economy and to expand the options available to economic agents for using their resources and choosing satisfiers.

The FLEC applies to almost every economic activity carried out within the Mexican territory. Only strategic economic areas reserved to the State, labor unions, intellectual property rights and some kind of export cooperatives are not considered monopolies and therefore, are not prohibited by the FLEC. However, even these exclusions from the monopoly prohibition do not apply when it comes to anti-competitive conducts and business combinations. In other words, even state companies operating in strategic areas are compelled to refrain from anticompetitive behavior carried out in related markets.

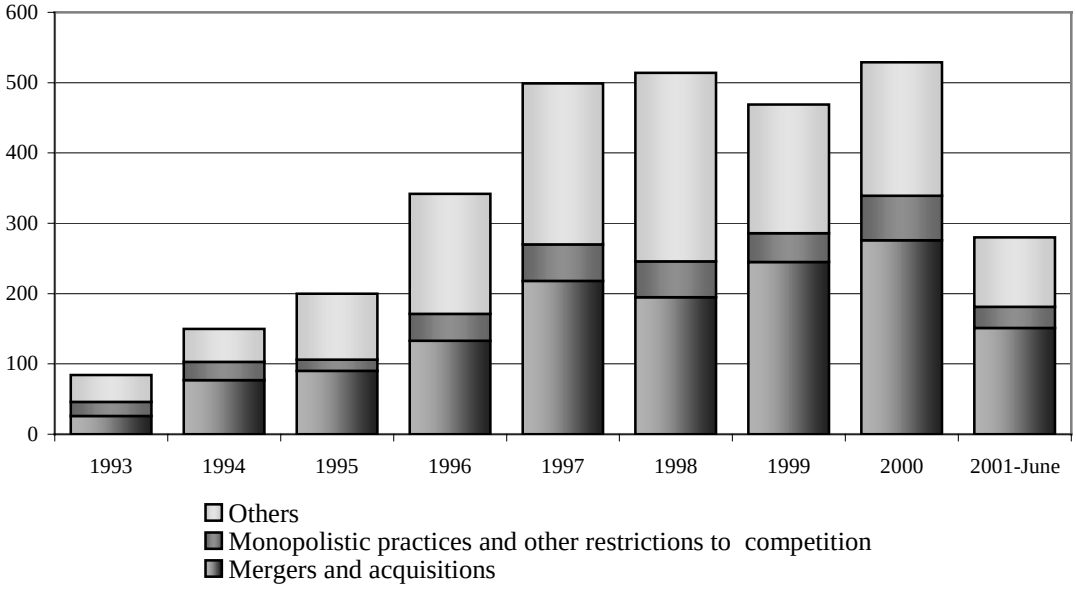
According to the FLEC, the FCC was set up to protect competition and freedom of access and to promote the establishment of free markets in every economic activity.

In march 1998, the Regulations to the FLEC (RFLEC) came into effect enhancing transparency and guidance in the enforcement of the Mexican competition legislation. The RFLEC characterizes relative monopolistic practices; develops in a greater detail the procedures provided for in the FLEC, simplifies proceedings for certain types of mergers (the so-called corporative restructuring), and establishes a tighter discipline on the diffusion of the FCC decisions and rulings. No additional changes or new provisions concerning competition legislation have been proposed since.

III. ENFORCEMENT OF COMPETITION LAW AND POLICIES. MERGERS AND ACQUISITIONS

The FLEC gives exclusive powers to the FCC to assess competition effects regarding mergers in all economic sectors in Mexico. Since its creation, the FCC has concluded more than 3,000 cases (see figure 1). Most of them were about mergers and acquisitions.

Figure 1. Cases concluded by the FCC



In 1993, the FCC reviewed 26 mergers; in 2000 this figure increased to 276, and to 151 in the first six months of 2001

Economic liberalization, the increasing number of transactions with international scope, the effects of revised regulatory framework and the divestiture of state companies largely explain the modifications in market structures and the consequent increase in the number of mergers notified to the FCC. For this reason, merger review constitutes one of the best mechanisms to prevent excessive market concentration that result in the creation of market power that can induce higher prices or insufficient supply of goods and services; and inhibit new investments and technological innovation.

Fundamentals of mergers and acquisitions procedure

Pursuant to Article 20 of the FLEC, mergers meeting the legal thresholds[2] shall be notified before the FCC. According to the FLEC and the RFLEC, merger notification must take place before one of the following events occur: a) the transaction has taken place; b) control is exerted over the acquired company; c) a merger agreement is signed, and, d) if the merger is a sequence of events, when the single event exceeding the legal thresholds is accomplished. Mergers that take place abroad must be notified before they produce "legal or material effects" in the Mexican territory.

Both merging and merged parties are compelled to notify the transaction, when required by the FLEC. Even though the buyer is the first party required to file the notification, the seller may as well

[2] Mergers should be notified to the FCC whenever the transaction's value exceeds $50.4 million, or accumulation of 35% of the companies assets is worth $50.4 million or having sales of this amount; or involve two or more firms with individual or joint sales of approximately $201.7 million or more and the additional acquired assets exceed $20.2 million understood as only the portion corresponding to the Mexican subsidiary.

comply with this obligation[3].. Regarding mergers aimed to reorganize a corporate company all parties are obliged to notify[4]

The FLEC empowers the FCC to request information and data from competitors and other parties when analyzing the corresponding transaction, although such firms or individuals do not become involved parties in the merger notification process. Strict confidentiality clauses protect all information submitted to the FCC from disclosure.

The FCC must issue its decision regarding mergers within 45 days following reception of notification[5],. If no decision is issued within said term, authorization from the FCC is granted to the notified merger.

To determine market effects and implications of a merger[6], notified transactions are subjected to a rule of reason test. The FCC analyses which markets are affected by the transaction (relevant markets) and to what extent the merged entity will have the power to restrict output or supply of goods or services or have the possibility to increase or manipulate prices without its competitors being able to offset such actions.

The actions adopted by the FCC can be either preventive or corrective.

Article 16 of the FLEC empowers the FCC to challenge mergers which aim or effect is to reduce, harm, or hinder competition and free access to the markets.

As mentioned above, in order to prevent the possible anti-competitive effects of mergers, individuals are obliged to provide prior notification of such operations whenever the amount of the transaction exceeds the limits set forth in the FLEC. To the same end, the FCC can require economic agents to give notice of future mergers or transactions, even if the amounts involved do not exceed the established thresholds.

Corrective measures apply to mergers for which compulsory notification has been omitted or falsified, and to those transactions for which prior notification is not required but which do reduce or hinder competition and free access. In such cases, the FCC is empowered to apply rulings, impose fines, or the annulment of the merger.

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3 Once the FCC receives notification of a merger, it: (i) requires basic information of the transaction through a preliminary questionnaire, which is available to the public through the FCC's correspondence office, and can be mailed upon request to any interested party; (ii) verifies that the documentation provided is complete and, if necessary, requests, additional information on one or more occasions. The FCC does not acknowledge receipt of the merger notification if these requirements have not been met, and (iii) decides if it orders the parties involved to refrain from closing the proposed merger, and from making any payments, exchanging any information other than that required for due diligence, or taking over the management of the company involved in the merger. This orders are issued by the FCC only when it considers that the merger involved is analytically complex. Moreover, these orders are issued only for preventive purposes. If the merger is deemed to the anticompetitive and the parties close the merger before it is approved, the FCC can order divestiture, with the associated costs and uncertainty to all parties involved.

4 See Annex 1 for additional information regarding Corporate restructuring.

5 Pursuant to the provisions of Article 21 of the FLEC.

6 As well as in the so called "relative monopolistic practices" which include vertical restraints, and abusive conducts.

In addition, the FLEC also empowers the FCC to open ex-officio investigations regarding mergers that have not been notified. The ex-officio inquiries must be initiated during a period of twelve months following the transaction. Based on the results of such investigations the FCC may order the dissolution of the transaction. These powers may apply both when the investigation relates to mergers for which notification is not required or for those which have not been notified even in spite of the legal obligation to do so.

IV. ILLUSTRATIVE CASES

In order to illustrate the criteria used by the FCC in the review of mergers some of the most representative cases are briefly described below.

The Cintra Case

On September 1, 2000, the main share-holders of Cintra presented a written consultation before the FCC regarding their intention to sell their shares. Cintra is a holding company that controls the two largest airlines in Mexico: *Aerovías de México (Aeromexico)* and *Mexicana de Aviación (Mexicana)*. The FCC's Plenum resolved that the sale of the two airlines should be made separately and to independent owners. The decision of selling these assets is of great importance as described below. This case also offers a clear example of the negative effects derived from the lack of a merger enforcement mechanism and the importance of preventive rather than ex-post actions.

Background

In the 80's, Aeromexico was privatized as a company free of financial or labor liabilities, emerged from the bankruptcy of Aeronaves de Mexico. Aeromexico was sold to a group of national investors. On the other hand, Mexicana was capitalized through resources provided by a group of new private investors who acquired control of the airline through the acquisition of two thirds of the shares, while the Federal Government kept 34%.

Aeromexico and Mexicana had a market share of 80%[7]. Several small companies operated also in the airlines' market.

At the beginning of the 90's, inadequate decisions brought both enterprises to a difficult financial position characterized by excessive indebtedness due to the leasing and acquisition of equipments at highly unfavorable conditions and the excessive hiring of personnel. The high operation costs and indebtedness brought Aeromexico and Mexicana to a bankruptcy limit.

Before the FLEC entered into force, in 1993, the Federal Government authorized Aeromexico, the airline with a better financial situation, to acquire control of Mexicana, its main competitor in the market at that moment. The Transportation and Communications Secretariat (SCT) imposed several conditions to maintain competition in the market. The conditions imposed included that both airlines should keep an independent operation, in other words, although Aeromexico controlled the shares of Mexicana, each of them had to continue defining its own operational and market policies (including airfares, routes, schedules, strategic commercial planning, among other). Thus, Mexicana was under the control of Aeromexico, but its operations and assets remained unmerged.

[7] Figure corresponds to January 2000

However, efforts carried out by the SCT could not prevent the creditor banks of both air companies assume the control of both from September 1994. The coincidence of an unsuitable management, together with an inadequate supervision of the new enterprises, created the false perception that the airlines would have failed due to market competition.

In May 1995, the banking institutions managing Aeromexico and Mexicana requested the FCC authorization as required by the FLEC in order to constitute a holding company to control the shares of both airlines. The holding called Cintra would operate as a "temporal financial vehicle" aimed to allow the banking institutions to capitalize the liabilities of the airlines. In this scheme, Aeromexico would no longer control Mexicana. They would operate as "sister companies", controlled by both by Cintra. Former shareholders of Aeromexico and Mexicana would become shareholders of Cintra.

The main purpose of such operation was: (i) to achieve the recovery and economic survival of the airlines through the capitalization of the banking debt; (ii) to enhance their operation through new investments, and (iii) to eventually sell each of the companies under **independent selling schemes**, once their financial solvency was re-established.

On August 1995, the FCC resolved to authorize the creation of Cintra subject to a series of measures aimed to avoid market power abuses and **to maintain the separate operation of the airlines** so that after a three year period, the companies could be sold separately. The scheme included elements aimed to prevent the "effective concentration" of the companies, while allowing to enhance their financial position. In other word, both airlines were to keep operating independently, thus, although they were controlled by a single company the two airlines shouldn't be considered as one agent for purposes of their operation and thus for antitrust enforcement.

Through an appeal for review presented by the shareholders before the FCC, the former resolution was modified by the Plenum of the FCC. It resolved that the divestiture of Aeromexico and Mexicana would take place once the financial and operative restructuring process of the companies ended. This decision implied the substitution of the previous three year period for a flexible non-restricted period.

Notwithstanding, the FCC kept the power to order the partial or total divestiture of the airlines, as well as to impose other fines and sanctions foreseen by the FLEC. Cintra agreed to those conditions.

Due to the banking crisis in 1995, part of the assets that banks held in Cintra, became property of the Banking Fund for the Savings Protection (Fobaproa)[8] In 1999, credit banks and Fobaproa transferred their Cintra's shares to the Institute for the Banking Savings Protection[9] (IPAB), meaning that the majority

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8 Trust Fund established according to the article 122 of the Credit Institutions Law, to protect the savers interests.

9 Decentralised organisation from the Federal Public Administration, with juridical personality and shareholders' equity, created through the Banking Savings Protection Law (published in the Official Gazette on January 19, 1999). This institute has the following objectives:

a) Provide Multiple Banking Institutions with a system to protect the banking savings that guarantee payments, through the Institute's assumption, in a subsidiary and limited way, of certain obligations of such Institutions.

b) To manage programs of financial reorganization that conducts in benefit of the savers and users of the institutions and in the payments national system safeguard.

According to the law, the IPAB assumes the responsibility for the reorganization programs conducted by Fobaproa, while the Federal Government through the Treasury Secretariat (SHCP) and the Bank of

of Cintra's shares were in hands of governmental organizations again. These transactions were authorised by the FCC, subject to the accomplishment of the conditions imposed in the previous resolution.

Since 1996 both airlines enhanced their operative incomes, reduced their financial expenses and stabilized their operations' costs.

Cintra's anticompetitive conducts

After Aeromexico and Mexicana were put under the control of Cintra, the competition process in the air transportation market and other markets related to it (tourism for example) experienced negative effects. A clear example, is the agreed reduction by Aeromexico and Mexicana of the percentage paid to the travel agencies for the air tickets sold by them, which meant to reduce from 10% to 7%.

Regarding air transportation, fares reached excessive levels in 26 commercial routes compared to fares offered in routes served also by other airlines. The FCC found agreements between the two airlines which included non competition clauses, market segmentation and price fixing. Furthermore, it learned that Aeromexico and Mexicana were transferring assets between each other without previously notifying to the FCC.

Cintra had undoubtedly infringed the FCC's resolution. The airlines were operating in some degree as a merged agent, affecting the competition process in several routes and related markets.

Consultation regarding Cintra's sale

In spite of the 1995 resolution and the agreement to sell Mexicana and Aeromexico separately, the shareholders integrated by the Federal Government, the IPAB and bank owners, presented on September 2000 a consultation before the FCC expressing their doubts about the feasibility of the resolution. From their point of view the separate operation of the airlines was not feasible nor economically reasonable.

The joint sale of the companies is equivalent to a merger and thus was reviewed under a traditional merger analysis. Based on the FLEC and its Rulings the FCC determined that:

- The merger of Aeromexico and Mexicana would increase concentration index to a very high level in all of the most important routes in the country. Each route is considered a relevant market. Although the airlines had already started to coordinate or "merge" their operations, such a process would become definitive and irreversible.

- Important economic and legal barriers hinder the access of both national and foreign competitors and strengthen the involved enterprises' market power;

- Since1995, Aeromexico and Mexicana had shown anticompetitive practices related to: substantial increase of air fares; collusion, agreed reduction of percentages paid to travel agencies. All of them revealed their market power.

Mexico, should carry out the necessary acts for the Fobaproa expiration. This way the IPAB acquired the largest property of Cintra's shares.

On October 2nd 2000, the FCC confirmed its previous resolution concluding that the concentration of Aeromexico and Mexicana, would permanently harm competition, since it would provide the merged agent with market power allowing it to unilaterally fix prices in most of the national routes. Moreover, in the long term, nothing would prevent the merged agent from establishing higher fares, reducing flights frequencies and lower service quality.

Based on these results, the FCC informed the petitioners that the joint sale of Aeromexico and Mexicana would be harmful for the markets and would violate the FLEC and article 28 of the Constitution. On the other hand, separating Aeromexico and Mexicana would foster greater competition in the air transportation service. This would in turn be an important factor in reducing fares, expanding the markets and offering better services to users without sacrificing safety. It would likewise enable sound development of the industry and technological progress based on new investments, and thus air transportation would contribute to the country's development.

The FCC challenged the arguments presented by the SCT, which basically consisted in three points:

a) Splitting up Cintra would promote a destructive competition behavior among airlines which would lead one of them to leave the market.

The FLEC, the Civil Aviation Law (CAL) and its rulings, empower the FCC and the sector regulator to act against collusive acts, predatory conduct or any other form of unlawful competition that may force one or both companies, or any other national airline, to bankruptcy. Articles 53(a) and (b) of the Regulations of the CAL empower the SCT to establish price regulation in the provision of air transport services under two situations. First, when the FCC declares that reasonable conditions of competition do not exist in terms of the FLEC. Second, on the basis of public interest, the FCC may request the regulator to impose a price regulation scheme before it actually issues such declaration. Thus, in Mexico's case, it is very unlikely that national airlines of a similar size and with financial resources alike, would become involved in a self-destructive price war.

b) the companies would not be large enough to be profitable in order to face market competition.

In this regard, petitioners put forward two arguments in support of the joint sale of the companies. First, in case of the creation of a hub, the resultant economies of scale would allow one of the companies to displace the other from the market. Second, the size of a separated air fleet would be inferior to that of other big companies operating at international level, thereby creating profitability problems. Both arguments where discarded on the following basis:

- No Mexican airport offers the characteristics and cost savings associated to a hub. Moreover, both companies presently operate networks based on the airport of Mexico City, which is the biggest airport in the country and there is no reason to believe this practice will not continue. Likewise, they may continue with their joint policies or other commercial strategies which, even if separately organized, would allow them to attain efficiency profits.

- Even a joint fleet of both companies would be smaller than its international competitors, but this situation does not set forth any profitability problems regarding their operation in the domestic market. This is demonstrated by the fact that other relatively smaller companies operate in the country. Besides, according to the economic literature on the air industry, scale economies go off rapidly, so that a company may be profitable and compete on prices

and quality with a reduced number of homogeneous airships. As international experience demonstrates, the most profitable companies of the world are not the bigger ones, nor those with large fleets, radial centrals or greater number of destinies.

Additionally, a small national airline can attain many of the efficiencies of size by a code sharing arrangement with an international carrier.

Thus, cross subsidising international operations with excessive profits obtained in the domestic markets would result against the nation interests. On the contrary, such competition should be carried out on efficient operation basis.

c) Sales value reduction

Pursuant to its legal mandate, one of the core objectives of the IPAB, the deposit guarantee agency and Cintra's main shareholder, consists in obtaining the highest possible recovery value from the sale of its assets. It has been argued, that maximum recovery value would be guaranteed if the companies were sold as part of a "package".

It is important to note that the value of a monopoly or a company with clear market power, if unregulated by the authorities, is always higher than that of companies operating in a free market environment. Excess profits and benefits that a monopoly can generate at the expense of consumers explain this outcome.

If Cintra was to be sold as a "single unit", the authorities would be forced to impose severe regulations in order to avoid abuses in view of the market power of the resulting company. If such regulations were correctly anticipated by investors, the value of the company would be much lower than if the companies were sold separately. If they were not anticipated, investors would be willing to pay more, for they would be acquiring a company with market power (or even a monopoly in certain routes), and they would complain that they were the victim of ex-post opportunistic behaviour on the part of the government, and future investments might be discouraged. Under such circumstances, the value of the company would be much lower than if the companies were sold separately.

Conclusions to the Cintra Case

Pursuant to articles 16 and 20 of the FLEC the FCC is empowered to review, block or authorise mergers. Merger review constitutes a tool aimed to preserve and ensure effective competition conditions in the markets, and thus better prices and quality of services and goods.

The activity of the FCC is based on the legal mandate to protect the competition process and free entry to markets, which serves as a counterbalance to other authority's acts, including regulatory authorities, whose approaches are different.

The Cintra example shows the difficulties related to revert the harmful effects of acts carried out by authorities on the basis of protectionist principles non compatible to competition and efficiency. This case is a clear example of the harm caused to consumers well-being under situations where market power can be exerted and the damage to reverting it.

The Aeromexico and Mexicana sale has not occurred yet. Consumers have been seriously affected over these years facing excessive tariff increase and lack of efficiency of the two companies controlling large part of the domestic routes.

Considering the aforementioned facts, a complex situation has developed. No agreement has been reached and there is no consensus regarding the Aeromexico and Mexicana sale, which has to be re-evaluated due to the precarious situation of the air industry, affected by unfortunate acts of terrorism suffered by the USA recently.

Mergers in the Financial Sector

The Mexican financial sector has experienced deep transformations, particularly after the *peso* crisis of 1994. Such transformation has encouraged a continuous growth in the number and scale of cross-border horizontal mergers and acquisitions in the sector. Behind such growth, there is a strong interest to achieve scale economies to cope with the remaining effects of the 1994 financial breakdown, increasing cross-border competition, deregulation and advance on information technology. Therefore, the number of participants in the financial markets have been decreasing.

This trend has demanded an active merger review by the FCC, specially regarding banking, insurance and pension funds' markets. The FCC's actions have aimed to prevent that the resulting agent acquires substantial power in relevant markets or that the concentration degree in such markets increase beyond convenient thresholds. Examples abound.

Conglomerate concentrations that substantially change the structure of financial markets

In 2000, *Grupo Financiero Bancomer (Bancomer)* and *Grupo Financiero Serfin (Serfin)*, the second and third financial institutions in Mexico, were acquired by *Banco Bilbao Vizcaya Argentaria (BBVA)* and *Santander Mexicano (Santander)* respectively, two of the major players in the Spanish financial system.

The analysis carried out by the FCC focused on those activities affected by each transaction, which included commercial banking, insurance and pensions funds' management. These markets have a national geographic dimension, since the branch infrastructure of the financial institutions enables consumers to use offices throughout the country to make their transactions. Other financial and non-financial markets that could be affected by the transactions were also analysed.

The enquiry showed that: *(i)* the participation of other national and international competitors is large enough to prevent anticompetitive conduct of the resulting party; *(ii)* the existence of legal and economic restrictions on entry (limits on foreign investment or the availability of bank branches and positioning of brands) do not impede national or foreign firms participation in Mexican financial markets.

Commercial banking

In this sector, the registered operations tend to enhance the consolidation of financial groups. These services are relevant to the financial system since they constitute the mean through which customers may access several services mainly savings, investment and credits.

The FCC's analysis to evaluate whether concentrations of banking financial agents could affect competition conditions and the variety of alternatives for bank users in Mexico, includes the assessment of economic and legal barriers to entry, as well as efficiency gains.

An other aspect to be considered for the assessment of the impact of banking concentrations is the variety of banking services provided by the institutions. These may include immediate demand deposits, fixed term deposits, banking bonus, inter-banking loans, saving accounts, commercial credits, credits to financial intermediaries, housing credits, consumer credits (through credit cards), governmental credits, fiduciary services and foreign currency exchange.

Likewise, the number and location of banking branches for the provision of services at specific geographic regions is relevant. Even when diverse financial companies have nationwide operations, special attention has to be paid to prevent the creation of agents with substantial market power. Thus, the number of branches of a banking institution to provide service in specific geographic regions was adopted as a measure to estimate the concentration indexes in a location.

Insurance

The impact of the proposed transactions in the insurance market was assessed by grouping insurance policies regarding: life, accident, medical care and damages. Since each insurance involves different risks, it may be concluded that different kind of insurances are complementary, this means, they are not substitutes among themselves, and therefore, represent different markets. Thus, the portfolio content of each insurance should be analyzed in order to detect the effects on competition.

Accordingly, each kind of policy was considered a separate relevant market. In none of them, the proposed acquisitions involved competition concerns, because the involved parties were not major players in such markets.

Afores

In 1995, the reform of the pension system took place with the aim to improve the Mexican society's capacity to increase its domestic savings. Such reform consisted in the adoption of a retirement system managed by *retirement fund management companies* (afores). Afores receive financial resources by means of compulsory and voluntary contributions from workers affiliated to the Mexican Social Security Institute (IMSS), which are placed at their disposal after their retirement.

As part of this reform, a sector-specific regulator and regulations were established[10], to promote the development of the pension system and to facilitate channelling pensions funds to productive investments such as infrastructure projects. To this end, the regulator was empowered to establish mechanisms to prevent anticompetive practices, including the FCC's participation when necessary. Likewise, the reform highlights the necessity that the afores notify to the FCC their intention to participate in such market.

Nowadays, 13 companies participate in the afores market, which shows regulatory limits on participation, in terms of the number of affiliates that each management company can register. Even when each worker may freely choose the afore that will manage its individual retirement savings account, they face economic barriers that obstruct free change among afores including, among others, the payment of a

10 National Commission on the Retirement Savings System (Consar) and the Law on Retirement Savings Systems, respectively.

substantial commission when a worker changes the afore managing his/her account more than once in a year. As result of such features, the market structure is highly concentrated.

Concerning market structure, the FCC has adopted as a guideline, to impede the presence of one agent in two afores, which would give rise to a situation of competitive disadvantage for the other participants in the market. The *BBVA/ Bancomer* acquisition falls in the latter assumption.

Resolutions

Once the FCC analysed all the relevant markets, it resolved to authorize the *BBVA/ Bancomer* and *Santander/Serfin* acquisitions. However, in the *BBVA/ Bancomer* case the FCC ordered the divestment of BBVA's afore in order to preserve Bancomer's afore, which is one of the largest in the market.

By evaluating the concentration effects in each involved financial market, the FCC prevented the creation of an agent with substantial market power, which would affect competition conditions and would damage users and customers of these services. Moreover, the financial entities in Mexico, became healthier and stronger without affecting competition and free entry to the markets or consumers.

ABB Vecto Gray Inc/ FIP, SA de CV

On March 7, 2001, the FCC was notified of the intention of ABB Vector Gray Inc (ABB) to purchase 100% of the stock of FIP, SA de CV (FIP), owned by Walworth de Mexico, SA de CV. ABB produces tools and systems used in maritime and terrestrial perforation and has no presence in Mexico. FIP is a company that produces, distributes and commercializes devices to interconnect petroleum pipelines and only carries out exports to Mexico. Thus, the transaction would not affect the structure of any of them.

However, in the stock purchase contract a non-competition clause was established so that neither Walworth nor its current shareholders, could for a ten-year period carry out directly or indirectly, the following acts: i) participate with more of 10% of the total stock as shareholders in any of the so-called "restricted operation"; ii) take active charge on restricted operation businesses in Mexico; and iii) request, foster or seek business related to any "restricted operation". The term "restricted operations" included the design, manufacture, marketing, sale, exportation, installation, repair and maintenance and service of the following products: casing heads, casing hangers, casing spools, tubing spools, tubing hangers, tubing bonnets and adapters, other well-head components, casting patterns and forged dies owned by FIP, and all drawing and intellectual property associated with the above.

To justify the scope of the non competition clause, ABB claimed the following defenses:

- The ten year non-competition agreement is only for certain FIP products, some of which have little or no restrictions on Walworth. FIP is a failing firm according to the seller.

- FIP products included under the non-competition clause, are related to valuable drawings and intellectual property rights.

- As a consequence of the concentration, the customers would enjoy broader product supply with superior quality resulting from better machine tools and engineering process, as well as a more reliable aftermarket service.

In the FCC's opinion, the ten-year period of the non competition clause was excessive because products under such clause were on a mature stage of their product-cycle. On June 18, 2000, the FCC

authorised the proposed concentration but conditioned it by reducing the non-competition episode to no more than five years.

The establishment of a non-competition clause to protect the rights acquired by an agent, should strictly correspond to the transaction scope, in order to avoid the creation of artificial access barriers into the market. This way competition is protected to benefit industry and consumers.

Mergers in utility sectors

Concessions and permits granted by the authorities may also have competition effects in the markets, and thus, are reviewed by the FCC under the same criteria applied to mergers. Additionally, several mergers are taking place among utilities –water, electricity generation[11] and natural gas- as a result of deregulation.

On March 31, 2000, Sempra Energy notified to the FCC its intention to obtain a permit to transport natural gas in the north of the State of Baja California, including the provision of gas to the distribution zone of Mexicali. On August 31, 2000, the FCC blocked the transaction, because it would imply the vertical integration of Sempra in two activities: transportation and distribution of natural gas. Sempra already held a permit to distribute natural gas in Mexicali. The integration of transport and distribution would give incentives to Sempra to carry out discrimination and other anticompetitive practices against other distributors On October 24, the defendant parties challenged the FCC's resolution by appealing for review before this authority. Finally, on November 29, 2000, the FCC reversed the appealed resolution. Nevertheless, its favorable opinion was subject to the condition applied to Sempra to divest the distribution permit in the geographical area of Mexicali.

V. BENEFITS DERIVED FROM MERGER AND ACQUISITION'S REVIEW

While mergers frequently lead to significant cost savings and other benefits, they may also be anticompetitive. Thus, merger and acquisitions review carried out by the FCC, allows the identification and prevention of potentially harmful transactions, thereby benefiting consumers and the development of economic activity. In this way, the FCC can prevent market damage, avoiding the widely acknowledged difficulties that accompany attempts to restore competition after anticompetitive transactions have been completed.

The efficient processing of filings has allowed competition to be protected without hindering business development or market dynamics. These results reflect the priority given to administrative measures intended to reduce costs associated with enforcing and observing the competition law.

The FCC has persevered with its policy of administrative enhancement, reducing response times, cutting back on formalities, and streamlining its paperwork. In addition, it has established internal procedures that substantially expedite resolutions on operations that are merely administrative restructurings. Thanks to these measures, greater resources can now be channeled into solving the more complex cases.

11 Despite the national electricity industry is still a public monopoly, the regulatory framework allows private agents to participate in electricity generation market.

VI. PENDING CHALLENGES

After its almost eight years of existence and hard work, the following issues remain as the major challenges for the FCC:

(i) **Lack of full societal understanding of the competition legislation**, which blocks its timely application. To this end, advocacy becomes a basic instrument to enhance competition policy, having the following objectives:

- *Broader diffusion of competition legislation*, will promote a better understanding of the competition's principles among regulators, economic agents and society. Public knowledge of the FLEC is important because complaints are an important source of information to the FCC.

- *Foster coordination with other regulatory bodies* concerning actions involving market behavior and regulation, granting concessions and permits; government procurement and public auctions.

(ii) **Lack of legal capacity to impose an effective mandatory request of information to merging parties outside the Mexican borders**.

The number of international transactions that have an effect on the Mexican markets increases gradually in absolute numbers and relatively, as part of the total cases filed.

The FCC has promoted coordination with other countries' competition authorities to exchange experiences and apply techniques of analysis of competition in a global context. This coordination has led to the negotiation and subscription of international treaties[12] and agreements Similarly, there has been active and prominent participation in international fora in which the topics of competition and best practices are discussed, among them are the OECD, WTO, UNCTAD and EFTA. This actions provide the FCC with better tools to protect Mexican interests.

(iii) **Cope with economic dynamism and technological progress**. Competition fosters the efficient reallocation of production inputs and resources from les profitably activities to those with higher rates of growth and returns. The FCC's task is to facilitate that reallocation process by preventing barriers of entry and excessive concentration in a given market, which create the possibility for the accomplishment of anticompetitive conducts and abusive pricing behavior. Research has shown that national champions and monopolies do not tend to be dynamic; their protection allows them to be lazy and thus stagnant.

[12] The chapter on competition in the Free Trade Agreements with the European Union and the G3 (group including), and the bilateral agreement on competition with the authorities of the United States of America are examples of cooperation mechanisms aimed to strengthen competition law enforcement.

ANNEX 1. - Corporate reorganizations vs. Mergers and acquisitions

There is only one exemption to the compulsory notification provided in Article 20 of the FLEC. The RFLEC establish that transactions among companies controlled by the same holding company[13] , should not be considered mergers under the terms of the FLEC if they are:

- legal acts regarding shares or partners' capital contributions of foreign companies, when the economic agents involved in the said acts do not thereby acquire the control of Mexican companies, nor accumulate in the national territory shares, partners' capital contributions, shares in trusts or assets in general, additional to those which, they directly or indirectly possess prior to the transaction, or

- transactions in which an economic agent has had in property or possession, directly or indirectly, over a period of at least three years, 98% of the shares or partner's capital contribution within itself or the economic agents involved in the transaction. In this case, the economic agents are compelled to notify to the FCC, within five days following the day on which they carry out the transaction.

To determine whether the transaction is a corporate reorganization or a merger of a different nature, the FCC considers that a transaction entails a corporate reorganization when the reasons for carrying out the transaction are simply operational, and whenever they do not imply any change in the actual control of the companies involved. In these cases, the FCC studies the equity structure before and after the merger plus the extent of control that the parties to the transaction have. Therefore, the analysis is kept simple, thus allowing the FCC to issue a ruling promptly. If more than a corporate reorganization is involved, a second stage to assess the effects of the merger is carried out. For this purpose, the FCC defines the relevant market or markets on which the merger will have effect, and on a case-by-case analysis, it assesses the associated competition effects.

13 based on criteria similar to those established by the Income Tax Law

ANNEX II. - Fundamentals of merger and acquisition analysis

The relevant market definition

The relevant market is defined by grouping goods (or services) that can substitute each other, in terms of use and price. For this purpose, the FCC takes into consideration product characteristics, their geographic location and the ease of conditions to the product or service and its substitutes.

Market Power.

Once the FCC defines the relevant market, it applies concentration indices in order to determine whether market concentration is significant. A firm which accounts for a large percentage of the sales in the relevant market may have the power to raise price above the competitive level. This is termed market power.

The danger of accumulation of market power is customarily assessed indirectly by measuring the level of concentration in a market, to do so the FCC have stated an arithmetical test to measure the degree of concentration of a relevant market based on the Herfindahl Index and the Dominance Index, the second was developed by a FCC's Commissioner and both rates measure the level of concentration on a scale of 0 to 10,000.

Thresholds are the following:

- the Herfindahl rate must be below 2,000 units and its increase must not exceed 75 units, and
- the dominance rate must stand below 2,500 units and its value must decrease after consolidation.

If the concentration degree in the relevant market does not exceed the thresholds established by the FCC, the transaction is not challenged. The FCC does not challenge a transaction whenever it finds it unfeasible to obtain substantial market power as a consequence of the transaction.

Market structure

The FCC also takes into consideration the existence of barriers to entry, import conditions, transport costs, the existence and power of present and potential competitors, and the recent conduct of the economic agents that participate in the merger, among other elements legally required.

Defenses (Efficiency gains)

If the conclusions reached in the above stages show that substantial power in the relevant market exists or would be acquired, the FCC assesses the possible efficiency gains derived from the merger, as compared to the costs it entails. The assessment contemplates the relevant elements, such as all effects on consumers and producers. If the FCC determines that the anticompetitive effects do not outweigh the efficiency gains, the merger is not challenged, although on occasions it may subject it to conditions that eliminate the possible anticompetitive effects. If the FCC determines that the anticompetitive effects of the merger are significant, and cannot be eliminated through specific conditions, it blocks the merger.

Session VI.

Other Contributions

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **28-Sep-2001**

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CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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COMPETITION LAW AND POLICY IN THE REPUBLIC OF BULGARIA

1 Legislation

The Constitution of Bulgaria, in force from 1991, sets up the basis for development of competition. It provides that the Bulgarian economy is based on free economic initiative. Paragraph 2 of Article 19 establishes and guarantees to all citizens and legal persons equal legal conditions as regards economic activity, preventing abuse of monopolistic position, unfair competition and consumer protection.

The current Law on Protection of Competition /LPC/ entered into force on April 29th, 1998. The reasons for its adoption might be summarised as follows:

The first Bulgarian legal model adopted in 1991 bore substantial differences when compared to the legal systems of other countries with long practice and established rules in this field;

The changes in the Bulgarian economy (privatisation, deregulation, liberalisation) and experience from the enforcement of the previous competition law;

The fulfilment of the obligation for approximation of Bulgarian legislation with the *acquis* under the Europe Agreement establishing an Association between the European Communities and their Member States, on one part, and the Republic of Bulgaria, on the other, is an important part of the preparations for membership to the EU in the context of the accession negotiations.

1.1 The objectives of the LPC

The Law on Protection of Competition declares in Article 1 that it aims at ensuring "protection and conditions for the promotion of competition and free initiative in the sphere of economy".

The Law does not mention the protection of consumers' interests among the legislative objectives, as was the case in the previous competition act. This is due to the fact that a special Law on consumer protection and trade rules was adopted. This law, which is in force from July 3, 1999 empowers the Commission on Trade and Consumer Protection and to the National Consumer Council, whose members are representatives of the line Ministries and Consumer Associations with the consumer protection.

Nevertheless, with its provisions concerning the control of dominant position and these related to unfair competition the Law on Protection of Competition takes into consideration consumers' interests.

1.2 The scope of application of the LPC

The scope of application of the LPC covers each activity, the results of which are designed for exchange on the market. The Law covers all sectors of the Bulgarian economy and applies to all undertakings, including the public ones and those entrusted with special or exclusive rights, public authorities and natural persons.

LPC retains the alternative effects doctrine: it applies to all undertakings which carry on their activities on the territory of Bulgaria or outside, if they prevent, restrict or distort or might prevent, restrict or distort competition in the country.

The consequences of activities that restrict or might restrict competition in another State, do not fall within the scope of the Law.

LPC contains the following **anti trust** provisions:

Chapter III prohibits all agreements between undertakings, decisions of connected or joint undertakings, as well as concerted practices of two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition on the relevant market. The prohibited agreements are automatically void, and their nullity may be invoked before the court.

The provisions of the Law do not cover, however, agreements, decisions or concerted practices with negligible effect on competition.

Restrictive agreements can be **exempted on individual basis** provided they contribute to increasing or improving the production of goods and services, to promoting technical or economic progress or to increasing the competitiveness on external markets, while allocating to consumers a fair share of the resulting benefits.

The Law provides for the **possibility of block exemptions**. It states that the Commission on Protection of Competition, by adopting a decision, may declare the prohibition inapplicable to certain categories of agreements when they meet the requirements of the Law. This is the legal base for the first CPC Decision for block exemption from the prohibition of Art.9 of certain categories of agreements meeting the conditions laid down in Art.13 of the Law. The decision follows closely the provisions of Regulation 2790/1999 on the application of Art.81 (3) of the Treaty to categories of vertical agreements and concerted practices.

Chapter IV of the LPC prohibits actions of undertakings enjoying a monopolistic or dominant position that have as their object or effect prevention, restriction or distortion of competition.

Chapter VI regulates the control of concentration of economic activity. The CPC authorises the concentration, provided that the latter does not result in creation or strengthening of a dominant position that would significantly impede effective competition on the relevant market. Authorisation may also be granted under the condition that certain requirements are met.

A concentration which creates or strengthens a dominant position, could also be cleared, provided that it aims at modernising the production or the economy as a whole, at improving the market structures, attracting investments, increasing the competitiveness on external markets, creating new jobs and better satisfying the interests of consumers. When assessing a concentration the CPC considers whether the advantages outweigh the negative impact on competition on the relevant market.

The LPC includes also provisions prohibiting **unfair competition**. **Chapter VII** of the Law covers the infliction of damages on the reputation of competitors, misleading advertising, imitation, unfair attraction of customers and disclosure of industrial or trade secrets.

2 Enforcement

The Commission on Protection of Competition /CPC/ is the authority charged with the implementation of the LPC.

From the beginning of 2000 until July 2001 the Commission adopted 45 decisions having for their object prohibited agreements, restrictive practices and abuse of dominant position, as well as 34 decisions concerning merger control.

An indicator for focusing the attention of the CPC in the area of antitrust is the number of ex-officio cases, which is 16 out of 24 cases (anti-trust and unfair competition). For a period of the same length - mid 1998 – end 1999, the number of these cases was two times lower.

The CPC examined 14 cases about prohibited agreements, decisions and concerted practices. During the period 33 decisions were adopted on abuse of dominance. A substantive part of them concerned state owned enterprises. There were 15 cases authorising mergers, including one case of conditional approval. With Decision №91/18.07.2000 the CPC imposes a fine to “Cable Bulgaria" Ltd BGN 5 000 (equal to EUR 2556,45) for not compliance with the obligation to notify to the Commission forthcoming concentration.

In motivating its decisions the Commission complies with the acquis and follows closely the practice on the European Commission and the European Court of Justice. For example, in Decision N°144/30.11.2000 the Commission is referring to Decision №6/72 in 1973 *Continental Can* and Decision N°32/65 on 13.07.1966, both of the European Court of Justice, in connection with the restriction of potential competition. In view of the above mentioned, Decision №28/14.03.2000 which rules against "Gips" Ltd, refers to the practice of the European Commission and the European Court of Justice in the field of "fidelity rebates" and particularly cases 27/76 *United Brands*; *Irish Sugar* (97/624 EU); *Suilker* and others.

The Commission on Protection of Competition strictly monitors the activities of enterprises with special and exclusive rights and has intervened several times in order to ensure effective competition on the markets where these undertakings operate.

In one of the most high profile cases the Commission imposed a significant fine to the Bulgarian Telecommunication Company for abuse of dominant position through unilateral imposition of unfair trading conditions, affecting the interests of the consumers of telephone services (Decision 21/22.02.2000).

The National Electricity Company has also been subject to investigations for abuse of dominance (Decision 64/22.06.1999).

Several times the Commission has examined the behaviour of "Water supply and Sewage" SOJSC because of imposition of unfair trading conditions, limitation of the technical development to the detriment of the consumers, as well as direct or indirect imposition of unfair purchase or selling prices (Decisions 58/25.05.2000 and 96/05.09.2000).

During the proceedings the CPC does not take into consideration specific regulatory issues and sticks to antitrust reasoning only. While in the past this position was not always sound from an economic point of view, now, after the creation of special regulatory bodies it seems the only logical way of behaviour on behalf of the CPC. The delimitation of jurisdiction between the Commission and the regulatory bodies has not, for the time being, given rise to any significant problems.

2.1 Examples from the practice of the Commission on Protection of Competition

Decision Nr. 81/11.07.2000

The CPC has initiated ex officio investigation for abuse of dominance and concerted practice on collusive price setting of phone cards on sale by BULPHONE Bulgarian Corporation for Telecommunications and Informatics (BCTI) J.-St. Co. and Radio and Telecommunications Ltd.

The CPC found that there was no abuse in the sense of Art. 18 LPC since the aggregate share of the two companies was below 35 % of the relevant market, and no other elements provided indications that the enterprises could behave independently from their competitors.

Upon absence of direct evidences for unfair co-ordination of activities, the basic criterion to establish collusive price co-ordination is the availability of perfect price parallelism.

In the course of the proceedings CPC has found out that after a period of fierce price competition, the prices of the two companies became equal. The process could not be time-bound with a change in the specific market conditions, that is the increase in costs for connecting and hiring phone lines from the Bulgarian Telecommunications Company PLC (BTC). At the same time, similar price dynamics could not be justified with the market structure as it has not changed substantially for the period under consideration.

BULPHONE BCTI J.-St.Co. and Radio and Telecommunications Ltd. have one holder of their majoritary share package– BTC. Taking into consideration the share participation, CPC assumes that BTC can not exercise a direct influence on the market conduct of the two companies. But, the participation of BTC representatives in the executive boards of the two companies allows to assume that BTC has played as an intermediator in price policy co-ordination.

With view to the above stated CPC assumes in its decision that there is a violation of Art. 9(1) (1)/LPC.

Decision Nr. 144/30.11.2000

The CPC has initiated upon its own initiative an investigation of agreement between Overgas Holding J.-St. Co. and Bulgaria 2002 J.-St. Co. Holding. (in liquidation). The motive for it is a contract for non-competing with territorial limitation, the territory of the country. Under the contract Bulgaria 2002 J.-St. Co. Holding (in liquidation) is obliged not to perform competing activities in the area of gasification for a period of 5 years. Overgas Holding J.-St. Co. has taken upon itself the obligation to pay a compensation for this restraint.

The CPC assumes that effective protection of competition on a particular market should take into account not only existing but also potential competition.

It reaches the conclusion that by the sole fact of signing the contract, Bulgaria 2002 J.-St. Co. Holding. seizes to play the role of a powerful potential competitor for a certain period of time. Led by these considerations, CPC prohibits the agreement and imposes fines on both companies.

Decision Nr. 139/16.11.2000

The CPC has initiated proceedings upon its own initiative on a distribution practice of Danon-Serdika J.-St. Co. which is a violation of Art. 9/LPC

The investigation is motivated by the fact that yoghurt packages produced by Danon-Serdika J.-St. Co. are launched on the market with a fixed retail price. The survey on the territory of Sofia shows that the price is strictly observed by retailers.

Upon reviewing the distribution agreements, CPC assumes that the imposed price on distributors deprives them from the possibility to widen their part of the market by decreasing the price. As a consequence safe harbours within the market are created. Thus secured, distributors do not have any stimulus to raise their competitiveness in their zones, which is entirely to the detriment of the customers. On the basis of the above, CPC concluded that this obligation in the distribution agreement of Danon-Serdika J.-St. Co contravened with the prohibition of Art. 9(1)/LPC.

On the grounds of the established facts, CPC decided to impose pecuniary sanction on the company, the amount depending on the gravity and duration of the violation.

Decision Nr. 108/28.09.2000

Unicredo Italiano S.p.A. and Allianz AG –Germany notified the CPC in connection with the privatisation of Bulbank J.-St. Co. In cases of concentration of banks, non-banking financial institutions and insurance companies, an obligation arises for notifying CPC.

Allianz AG is present on the Bulgarian banking market with its control share in Allianz Bulgaria Holding J.-St. Co., controlling Bulgaria Invest Commercial Bank J.-St. Co. In this case CPC assumes no concentration is established by acquiring 5 % of the shares of Bulbank J.-St. Co., Allianz AG, the acquiring company, would not be in a position to exercise control over the acquired one.

CPC established that Unicredo Italiano S.p.A. does not participate on the Bulgarian banking market. In this particular case the company did not have shares in undertakings under the control of Allianz AG in Bulgaria. Thus, the possibility for exercising indirect control over them is excluded.

On the grounds of the above CPC decided that the acquisition of shares by Unicredo Italiano S.p.A. representing 93% of the capital of Bulbank J.-St. Co. and the acquisition of shares by Allianz AG representing 5% of the capital of Bulbank J.-St. Co., did not fall within the scope of Art.24/LPC.

Decision Nr. 60/10.05.2001

The CPC has been notified for a planned concentration by two operators in the insurance sector: “T.B.I. Holding H.B.” Ltd, Holland and “DZI 2000” Ltd. The concentration consisted in acquisition by a consortium “T.B.I. Holding Company H.B. – DZI-2000” Ltd of 67% of the share capital of “DZI” Ltd.

“T.B.I. Holding H.B.” Ltd, Holland and “DZI 2000” Ltd have respectively 99% and 1% control share in the consortium. “DZI” Ltd is 100% state-owned enterprise.

The company ZPAD "Bulstrad" which is a part of the economic group "T.B.I." According to Type Convention, signed in London in 1953 is designated as Bulgarian representative for "Green Card" system. It is the only company providing this service in the country.

The CPC found that the aggregate market share of the undertakings concerned is 50.64% (in 2000). Taking into consideration this fact the Commission considered as indispensable to make a detailed study of the market in order to establish the presence or the lack of dominant position. The CPC concluded that there is strong competition on the relevant market.

Based on the examination of the investment program presented by "T.B.I. Holding Company H.B. – DZI-2000" Ltd, the CPC concluded that the planned concentration could have positive economic effects. It would contribute to the modernisation of the acquired company, the improvement of the quality of the services and the enhancement of the competitiveness of "DZI" Ltd. The Commission considers also as important the obligation assumed by T.B.I. Holding to keep, with minimal discharges, the employees of the acquired society.

2.2 The main difficulties CPC faces in the enforcement of anti trust provisions

The main difficulties the CPC faces in anti-trust enforcement concern:

- gathering of evidence during the investigation of prohibited agreements and concerted practices;

- insufficient awareness by the economic operators of the competition legislation, particularly in the field of prohibited agreements and concerted practices, which might result in the prevention, restriction or distortion of competition on the relevant market;

- insufficient experience in the implementation of the provision of Art. 13 (3) LPC, particularly concerning the formulation of conditions, imposed to the parties of an agreement, when the Commission adopts a decision for individual exemption.

2.3 Competition advocacy

The CPC has statutory rights in the field other than LPC enforcement. Thus it is regularly consulted be the Privatisation Agency on the conditions of transactions and on the opportunity of selling public enterprises.

The CPC plays an important role in the process of deregulation and liberalisation. The Commission is consulted on draft acts and regulations related to the competitive environment or regulating the behaviour of undertakings with special and exclusive rights on the relevant market. In this respect the opinions of the Commission on the draft amendments of the Energy Efficiency Act and the Telecommunications Act are of particular importance.

During the last year CPC's representatives participated in a commission appointed by the Prime-Minister which made an analysis of the legislative and regulatory acts establishing licensing and registration regimes. The commission examined about 520 regimes. 330 were considered likely to affect the development of business. Some of these regimes were simplified, while other were abolished.

ANSWERS TO THE QUESTIONNAIRE

2. Example

Decision Nr. 93/5.09.2000

With CPC Decision N 4/ 17.01.2000 on the grounds of Art.36, par. 1, p.3 of the Law on Protection of Competition /LPC/ the Commission on Protection of Competition /CPC/ initiated ex-officio investigation with the following objective: the existence of illegal agreement between undertakings performing public transport services for passengers "on additional destinations." [Sophia has three forms of public transportation: fixed route buses and trams that are owned and operated by the city; regular taxi services, which are private; and an intermediate service "on additional destinations" in which the beginning and end points are fixed but the private companies providing the service may choose the routes they travel. between This case involves 12 providers of this intermediate service.]

In the course of the investigation written evidences were incorporated as follows:

- publication in the newspaper *"Sega"* that 12 transport-companies in Sofia, had on 05.01.2000 augmented by 0.20 lw., the prices of the services.
- oral statements of the representatives of the companies;
- written explanations of the representatives of the companies.

As a general rule, in their statements, the companies explained that the increase of the prices was due to economic reasons:

a) the rise of petrol products prices in 2000 as compared to 1999;

b) the additional costs raise /salary, insurance, spare parts, maintenance and the amortisation expenditures;

c) incomes decrease.

Relevant market analysis - Pursuant to § 1, p.5 of the Additional Provision of LPC, the "relevant market" is defined as:

a) product market

b) geographical market

a/ Product market

The CPC assumed that the market should be defined as **the market of public transport for passenger on additional destinations.**

b/ The geographical market shall be defined as the market covering the territory of Sofia.

The participants on the relevant market are the 18 companies, which provide transport services in Sofia.

According to the written statements of the companies, the increase of the petrol product prices is the most important reason for raising the prices of the services. The economic analysis pointed out, that the prices of the petrol, gas and diesel were slightly increased in 1999, but this could not explain the price increase. [In response to a question by the Secretariat, the Bulgarian authority explained that the cost increases could not explain the price increase because: during the period under investigation the prices have varied but not significantly and not at the moment of the price rise. Besides, the companies involved in the agreement have different market power, they secure the service through different types of vehicles and thus their dispenses with regard to the provision of the service are different.

The CPC found that 12 companies have met in Cafe "Valcite". The representatives of the companies explained, that they had discussed the prices of the transport services. The cartel members did not realise that they had done something illegal. They stated: "Yes, we decided to increase the prices. We agreed for 0.20 lw. increase. We published this announcement in the newspaper, because we wanted to prepare customers for the increase of the prices." and "This meeting was not official. We just talked about our problems and about prices too, but what is wrong?"

The effect of the cartel - increase of prices of the services with 0.20 lw. simultaneously.

The CPC decided, that the conduct of independent enterprises, aimed **at simultaneous and identical** raise of the price of the transport service for a relatively long period of time could be defined as **"concerted practice"**.

The CPC assumed that the existence of a "parallel" conduct /parallelism/, through which the conditions for competition are distorted is a **non-typical market conduct** that could not be explained with the economic conditions.

Direct and indirect price-fixing is **extremely serious violation** of the competition rules. The exchange of information between competitors regarding prices falls within the definition of the term "concerted practices" even in case they have not intended to form a cartel. These activities limit and violate always the rights of the consumers.

The CPC imposed fines, which were proportional to the market share of each of the companies on the relevant market:

6 companies - 2569 EUR
6 companies - 3596 EUR
2 companies - 5137 EUR

3. Standard of proof for competition enforcement

The Law on Protection of Competition states that written, as well as oral evidences are admitted during the procedure before the competition authority.

On the investigation stage the rapporteur should examine the circumstances concerning the file, by:

1. requesting written or oral explanations from the applicant; from the person against which the complaint for violation of the law is brought, from undertakings, and from State and local authorities. The written explanations should be recorded and signed by the person who has given the explanations;

2. requesting copies of private and official documents;

3. requesting written opinions from State and local authorities.

At the sittings of the Commission written evidence are admitted and the explanations of the parties should be heard.

The chairman may order that a party appear in person in order to give explanations.

- **Available sanction for competition enforcement**

  Pecuniary sanctions
  For infringement of the Law on the Protection of Competition (offences under Art. 9, Art. 18, Art. 30 to Art. 35, as well as for carrying on operations under Art. 11, paragraph 1, Art. 15, paragraph 2, Art. 20, paragraph 2 and Art. 24, paragraph 1 without authorisation), the CPC imposes a **pecuniary sanction** on the **undertaking**, in favour of the State, to the amount of BGN 5 000 000 (EUR 2 500 000) to BGN 300 000 000 (EUR 150 000 000).

  In case of a repeated offence the Commission may impose a pecuniary sanction on the undertaking to the amount of BGN 100 000 000 (EUR 50 000 000) to BGN 500 000 000 (EUR 250 000 000).

  In case of failure to perform a decision of the Commission the latter may impose a pecuniary sanction on the undertaking, to the amount of BGN 100 000 000 (EUR 50 000 000) to BGN 500 000 000 (EUR 250 000 000).

  Fines
  The natural persons who have committed or admitted the committing of offences under the Law, where the act does not constitute a crime, are liable to a **fine** of BGN 1 000 000 (EUR 500 000) to BGN 10 000 000 (EUR 5 000 000).

  Natural and legal persons who fail to submit on time the evidence requested or accurate information, or fail to appear in person to give explanations before the Commission, are liable to a fine of BGN 500 000 (EUR 250 000) to BGN 2 500 000 (EUR 1 250 000).

  In case of a repeated offence the guilty person are liable to a fine of BGN 2 000 000 (EUR1 000 000) to BGN 20 000 000 (EUR 10 000 000).

  In case of minor offences the Commission may impose a fine below the established minimum threshold.

4.a/ Principles for calculating sanctions for economic law violations and crimes

According to the Administrative Violations and Sanctions Act /AVSA/ the administrative sanctions, which may be stipulated and inflicted for the commission of **economic law violations**, are a public censure, a fine and a temporary deprivation of the right to practice a certain profession or activity.

The principle is that the liability to administrative sanctions is personal. The AVSA provides, however, that a property sanction may be imposed on juridical persons and sole traders as well for any failure to discharge their legal obligations to the state stemming from and in connection with the performance of their activities in such cases as are provided for in a relevant law or decree of the Council of Ministers.

The law provides for the principles, which should be respected for calculating the amount of the sanctions. According to this act account should be taken of the gravity of the violation, the motives or inducements for the commission thereof and other extenuating and aggravating circumstances, as well as the property status of the offender.

The sanctions for **economic crimes** should be calculated in accordance with the provisions of the Penal Code /PC/and in the limits established by the code.
In meting out the punishment the court should take into consideration the degree of social danger of the act and the perpetrator, the motives for crime perpetration, and other attenuating or aggravating circumstances.

4 b/ Principles for calculating sanctions for competition law violations

Calculating the sanctions for violations of the competition legislation the Bulgarian Commission on Protection of Competition respects the principles settled by the AVSA. It takes into account the Community law and the practice of the European Court of Justice and the European Commission.

In the field of prohibited agreements, for example, the CPC takes into consideration the *Commission notice on the non-imposition or reduction of fines in cartel cases.* In compliance with this notice the CPC has granted in some cases reduction of sanctions to enterprises co-operating with the Commission during the investigation.

The Commission considers that ensuring detection and prohibition of such practices is primordial for the public interest and should outweigh the interest in fining those enterprises, which co-operate with the Commission.

4 c/ Principles for calculating sanctions for procurement fraud, tax fraud and securities fraud

- **Sanctions for procurement fraud**

  The sanctions for procurement fraud are established by the Public Procurement Act. This law states that:

  - Any offences under the Act, such as do not constitute a criminal offence, shall be punishable by fine in an amount not to exceed one half of one per cent of the relevant contract value, but not smaller than BGN 1 000 (EUR 500).

  - Any principal within the meaning of the Act who fails to comply with the requirement to conduct the public procurement award procedure shall be punishable by fine in an amount

not exceed five per cent of the relevant contract value, but not smaller than BGN 5 000 (EUR 2 500).

- Any principal who fails to perform the actions prescribed by the review authorities shall be punishable by fine in an amount from BGN 200 (EUR 100) to BGN 1 000 (EUR 500).

- Any officer who fails to provide, within the time limit prescribed, any such evidence or information concerning the award or performance of a public procurement contract as may be requested from him shall be punishable by fine in an amount from BGN 50 to 250.

Also punishable under this provision shall be any officer who fails, without any valid reason, to refer a complaint promptly to the competent authority or court.

- **Sanctions for tax fraud**

The Penal Code states:

- A person who avoids payment of tax obligations of large amounts, as well as fails to submit a tax return as required by law, or who confirms untrue statement or conceals truth in submitted statement, shall be punished by deprivation of liberty for up to three years and a fine of up to five hundred Bulgarian Leva.

- If the undeclared and unpaid tax obligation together with the interest due is paid to the budget prior to completion of the judicial inquiry at the court of first instance, the punishment shall be a fine of up to two thousand Bulgarian Leva.

- A person who, for the purposes of preventing the establishment of tax obligations of large amount, keeps accounting or uses accounting papers of untrue contents, shall be punished by deprivation of liberty from one to five years and a fine of thousand to five thousand Bulgarian Leva.

- Where the acts have served to conceal tax obligations of particularly large amount, or where they have been committed with the participation of an officer of the tax administration or a certified public accountant, the punishment shall be deprivation of liberty from two to ten years and a fine from two thousand up to twenty thousand Bulgarian Leva.

In cases of minor importance the punishment shall be a fine to the double amount of the concealed tax obligations, imposed by administrative procedure.

If the undeclared and unpaid tax obligation together with the interest due is paid to the budget prior to completion of the judicial inquiry at the court of first instance, the punishment shall be deprivation of liberty for up to three years and a fine of up to ten thousand Bulgarian Leva.

- A person who establishes a legal person or a foundation, which do not pursue, or seemingly pursue the activities and objectives declared upon registration, for the purpose of obtaining credits under the cover of such institutions, to be exempted from taxes, to obtain tax relieves or to obtain other material benefits, as well as to pursue prohibited activities, shall be punished by deprivation of liberty for up to three years, a fine of three to five million Bulgarian Leva and deprivation of rights to hold a certain state or public office or to exercise a certain vocation or activity.

- **Sanctions for securities fraud**

The violations of the Securities, Stock Exchanges and Investment Companies Act are fined to the amount of BGN 2 000 (EUR 1 000) to BGN 10 000 (EUR 5 000), unless the action committed does not constitute a crime.

A person who pursues transactions in securities as an occupation, without obtaining a license under the terms and procedures of this Act, is fined to the amount of BGN 5 000 (EUR 2 500) to BGN 20 000 (EUR 10 000), unless the action committed does not constitute a crime.

For the mentioned violations, legal person is sanctioned to the amount of BGN 10 000 (EUR 5 000) to BGN 50 000 (EUR 25 000).

QUESTIONARY

Name and type of restriction	Product or service	Geographic area	Duration of the cartel	Evidences	Amount of commerce	Sanctions
Concerted practice/price-fixing/ between 14 undertakings /horizontal/	Public transportation for passengers on additional destinations	Sofia	01-09.2000	- 12 undertakings, operating on the relevant market, announce in a newspaper, that they intend to increase the price of the service on 05.01.2000. - oral statements of cartel members	No data	92 000 lv. ; prohibition of the agreement (approximately EUR 47000)
Illegal agreement between Overgas Holding J. St.Co. and Bulgaria 2002 J. St. Co. Holding/horizontal/	Services in the area of gasification	The territory of Bulgaria	11.1998 –	- contract between the two companies, which includes non – compete clause in the area of gasification for a period of 5 years.	No data	50 000 lv. ; prohibition of the agreement (approximately EUR 25500)
Illegal agreement "Contract of exclusive distribution" between Mlechen Pat J.St.Co. and Balkan Milk Products Ltd.	Milk products	The territory of Bulgaria	07.1995-08.1997	price fixing and non-compete clause in the contract for exclusive distribution between the two companies.	No data	Prohibition of the agreement
Concerted practice/price-fixing/ between "Bulfon" J.St.Co. and "Radiotelekomunication Company " Ltd./horizontal/	Phone cards	The territory of Bulgaria	07.1999-07.2000	perfect price parallelism, which is a non-typical market conduct regular meetings between the two companies. A shareholder in "Bulfon" J.St.Co. is a shareholder in "Radiotelekomunication Company " Ltd. acted as a negotiations mediator.	No data	Fine of 18 000 lv. Imposed (approximately EUR 9 000)
Illegal agreement/price-fixing/-distribution agreements of "Danon-Serdika" J.St.Co./vertical/	Natural yoghurt	The territory of Bulgaria	01.-11.2000	- Distribution agreement, which include price-fixing clause for retail prices.	No data	Prohibition of the price-fixing clause and fine of 10 000 lv imposed. (approximately EUR 5000)

Organisation de Coopération et de Développement Economiques
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CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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ORGANISATION AND FUNCTIONS OF ENTITIES IN CHARGE OF THE DEFENSE OF FREEDOM OF COMPETITION IN ECONOMIC ACTIVITIES

1. General Aspects

Decree Law No. 211 of 1973, with its subsequent amendments, created diverse organisations in charge of the prevention, correction and repression of commercial practices that might harm freedom of competition in economic activities.

These agencies are:

1.1. The Economic National Prosecutor´s Office.
1.2. The Resolutory Commission
1.3. The Central Preventive Commission, and
1.4. The Regional Preventive Commissions

2. Economic National Prosecutor's Office

The Economic National Prosecutor's Office is a regulatory agency, which is autonomous and independent, with its own patrimony and legal status; it is decentralised and related to the Government by means of the supervision of the President of the Republic via the Ministry of the Economy, Development and Reconstruction.

As regards its internal organisation, each regional capital has a Regional Prosecutor who reports to the National Prosecutor and carries out his functions within the jurisdiction of the territory of each respective region.

The Prosecution Office has been structured like a juridical and technical team, so its members can act together with the Resolutory and Preventive Commissions. At present it has a permanent staff spread out along the country, which includes lawyers, engineers and economists.

The public authority of the Office is related to the regulation and control of economic activities, from the point of view of competition in the development of these activities.

In general, its areas of competence relate to two main duties:

2.1. It provides services of a juridical and economic nature related to the protection of freedom of competition in economic activities, in which it investigates anticompetitive activities of economic agents and market structures and proposes to the Preventive or Resolutory Commissions, whichever the case may be, the measures to be taken to prevent, correct and/or penalise attacks against freedom of competition and abuses of a dominant position or monopolistic practices, resulting from the accusations and inquiries made by authorities or private individuals, without prejudice to the normal duties of the Prosecution Office in accordance with its legal powers.

In this area, the Prosecution Office investigates markets and reports to the corresponding Commissions, or requires them to take the corrective or penalising measures that correspond in each case, in accordance with their legal faculties.

Consequently, the Prosecution Office carries out the following basic and permanent functions:

- It carries out investigations into attempts against freedom of competition and other economic crimes in accordance with the law. In this sense, it can act by virtue of its authority, by accusation, or by inquiries made by authorities, companies and the general public.

- It informs and advises the Resolutory and Preventive Commissions in the cases they are trying, and enforces the fulfilment of their rulings.

- It co-ordinates the work of the Central and Regional Resolutory and Preventive Commissions, and of the 12 Regional Prosecution Offices, in addition to representing public economic interest before the Supreme Court, before other Ordinary Courts of Law and the Resolutory Commission.

In those cases in which the Prosecutor brings charges before the Competition Tribunal, known as Resolutory Commission, he acts as prosecutor defending economic public order, with all the powers conferred to him by law.

2.2. It is also important to describe the work carried out by the Public Prosecutor in relation to advisory and technical and administrative support to the Preventive and Resolutory Commissions respectively, as the law has not provided these commissions with their own administrative infrastructure. The Prosecution Office provides these services in accordance with the express legal mandate in this area, without prejudice to the faculties of the Prosecution Office regarding the protection of the rulings and decisions of these Organisations.

In the exercise of these advisory functions to the Resolutory Commission, which are different from those of his role as accusatory party in representation of the general interest, the Prosecutor acts as a specialised collaborator of this Court, to which he provides technical assistance in the administration of justice.

In the exercise of his powers, the Economic Prosecutor is absolutely independent from the authorities or courts of law before whom he acts, and can defend the interests he is protecting in the way he deems legal, in accordance with his own appreciation, and in accordance with the express terms of the law.

As can be seen, the role of the Prosecutor is different and separate from that of the Commissions, all of which fulfil their functions with complete autonomy, which in no way contradicts the due interdependence that exists in the exercise of their respective functions, as can be seen from the fact that that Prosecutor's actions can put into motion the administrative activity of the Preventive Commissions, or the jurisdictional activities of the Resolutory Commission; at the same time the Preventive Commissions can ask the Prosecution Office to investigate acts against freedom of competition or those which could constitute an abuse of a dominant position, and the Resolutory Commission on its part, can order the National Prosecutor to ask the State Attorney's Office to exercise penal action in connection with crimes established by law.

In short, according to the established legal system, the Prosecutor investigates and proposes to the Commissions determined measures to protect freedom of competition in the markets, while the

Commissions give a definite ruling regarding these or other measures they deem legal, owing to the fact that these Commissions have the power to decide on these matters.

3. Resolutory Commission

The Resolutory Commission, presided by a Supreme Court Magistrate, is the special Court of Law in charge of the coercive correction of attempts against freedom of competition and of penalising guilty parties with the fines and other measures established by law. In addition, as established in that legal corpus, it is in charge of supervising the adequate application of the legal terms of Decree Law No. 211 of 1973, and the correct performance of the Commissions, by issuing the pertinent instructions.

The Resolutory Commission has ample powers, the jurisdictional functions of which it exercises by means of procedures ruled by law. It can try cases on its own authority or as a response to a request of the Prosecutor's Office dealing with any situation considered anticompetitive and can, in view of those requirements, undertake independent investigations, with the amplest of faculties, including the use of law enforcement personnel.

When treating these cases of a litigious nature, it can adopt some or all of the following measures: declare null and void all proceedings, systems, arrangements or agreements considered anticompetitive; it can cancel the legal status of any Corporation or order the dissolution of any juridical person in general (commercial associations, for example); it can also declare that persons involved in these legal proceedings are unable to occupy posts of professional or union representation for periods ranging from one to five years; it can order fines for a maximum of 10,000 tax units (Unidades tributarias), and finally, can order penal actions for the investigation and penalisation, by ordinary courts of justice, of the penal crime of attempting against freedom of competition.

The Resolutory Commission can also demand that public authorities modify the legal or regulatory provisions it considers contrary to freedom of competition, and in certain specific cases, there exist a number of special laws that give the Commission power to inform on the competition conditions of certain markets, especially for the effects of regulating or fixing prices.

In its capacity as maximum organisation within the system, the Resolutory Commission has the directive and correctional jurisdiction over all the Preventive Commissions, and its rulings are subject to the jurisdiction of the Supreme Court, so that all affected parties, the Public Prosecutor included, can file diverse appeals.

4. The central Preventive Commission

For the Santiago Metropolitan Region, this Commission, presided by a representative of the Ministry of the Economy, Development and Reconstruction, has the same functions and powers of the Regional Preventive Commissions.

Furthermore, it must deal with all those cases that are national in character or that refer to more than a single Region.

These Preventive Commissions do not have the objective of imperative penalisation or correction of any situation pertaining to freedom of competition in economic activities; their objective is to inform, to issue reports and establish the means to be used so that private individuals and State organisations can face situations that affect freedom of competition in those activities, be it on the request of the Prosecutor or in

reply to requests and claims, or those that the Commissions, under their own authority, consider that are affecting freedom of competition.

Exceptionally, and on the request of the Prosecutor, the Commissions may suspend, over a maximum period of 15 days, the application of agreements that might restrict freedom of competition; they can also fix maximum prices for certain products or services over the same period, while they conclude the investigation. These measures can be renewed for another 15 days.

The functions of these entities are essentially preventive and consultative in nature and their rulings lack the legal mandate of the rulings of the Resolutory Commission.

Contrary to the Resolutory Commission, these Preventive Commissions are administrative bodies that do not exercise jurisdiction.

5. Regional Preventive Commissions

Regional Preventive Commissions and a Regional Economic Prosecution Office have been established for the administrative regions into which the country has been divided. The latter body depends on the Economic National Prosecutors´s Office, headquartered in Santiago, and the Regional Prosecutors must provide technical and administrative support to the work undertaken by the Commissions.

As we have said, the functions of the Regional Preventive Commissions are similar to those of the Central Preventive Commission with regards to their respective jurisdictional territory.

REPLY TO QUESTIONNAIRE ON ACTIONS AGAINST CARTELS

A. General Information Regarding Cases

1. Agreement Regarding Pharmacy Prices

Although this case was settled on May 16th 1995, it is one of the relevant cases that this FNE (Economic National Prosecutor's Office) has ever seen in the area of cartels. The specific conduct investigated referred to a price agreement reached by four chains of local pharmacies, a behaviour that has led to new investigations on the matter. They were all penalised by the Resolutory Commission, the Chilean Competition Tribunal.

Three of these chains of pharmacies were penalised with fines of about US$ 80 000 each, and the fourth, was penalised with a fine of approximately, US$ 40 000 for the reasons we will give hereunder.

The Economic National Prosecutor's Office also requested the Resolutory Commission to authorise it to file charges for the crime of monopoly as established in Article 1 of our Law of Defence of Competition, Decree Law No. 211 (or DL 211). The Commission rejected the request and the FNE appealed against this decision in Supreme Court, which did not accept this appeal.

According to Chilean law, the maximum fine applicable is 10 000 tax units. DL 211 does not specify if this corresponds to annual or monthly tax units, so it might be the equivalent of approximately US$ 400 000 or of US$ 4 800 000 if it is interpreted as an annual measure. This maximum fine will be reviewed, owing to the fact that the FNE and the Ministry of the Economy have proposed a project for reforming DL 211, which aims at fixing a fine of 30 000 tax units per annum, which would give a maximum equivalent of US$ 14 400 000.

It is important to inform that this price agreement was reached by the companies fined, after they had been involved in a price war as the result of the arrival to Santiago, the Chilean capital, of a fourth chain of pharmacies that operated in other regions. After this price war, the four chains agreed on certain price levels so as to avoid further damage and loss. The company that had just arrived in Santiago stated that it had been forced into the agreement and it was their executives that provided testimony that gave proof of the agreement. Nonetheless, the Commission did not accept the allegation that the company had been under pressure to join the agreement, but its fine was reduced by fifty per cent because it provided data and elements of proof that showed the existence of the cartel.

The evidence provided by the FNE was basically founded on studies of price performance and statements issued by those executives that had a direct participation in the agreement.

Finally, it is important to point out that in general, the defence of the companies was based on the fact that the main problem was the entrance to a new territory, with very low prices, on the part of the incoming company and that the price uniformity was the result of a normal market situation after a price war between competitors.

2. Collusive Behaviour of Milk Processing Plants

This case is currently being seen by the Resolutory Commission and there is yet to be a final ruling. It was initiated on the basis of a preliminary FNE investigation into the markets in three regions in the South of Chile and the way in which milk processing plants purchased fresh milk from local producers.

Basically, the following were the behaviours that the Prosecutor's Office detected as being possibly anti-competitive or illegal:

- Distribution of geographic markets: the milk processing plants that purchase fresh milk from producers distributed the market or territory among themselves.
- Refusal to buy: it was proved that plants refused to purchase milk from producers that changed receptor plants, thus restraining the mobility of producers.
- Unilateral fall in purchase price: by abusing their dominant position, the plants have lowered their milk prices, a behaviour that has been influenced by a non-aggression pact between them.
- Price discrimination: the prices paid to different producers have no established parameters, and there exist no criteria for objectively determining the price to be paid to each producer.
- Opacity or lack of transparency in the sample taking process; lack of a reliable independent system of quality verification, a factor that determines the price to be paid for the milk purchased.

These practices were the object of a FNE claim before the Resolutory Commission, which is currently under review. When filing the action, the FNE requested that as a precautionary measure, processing plants should be asked to publish in advance the factors and criteria they would apply to determine the price of the milk provided by the producers. The measure was approved and is currently under application.

In the past few weeks, the Commission has also reviewed the prices that production plants have established this season, and has even temporarily suspended the application of new payment guidelines by production plants that were very similar.

B. General Information Regarding Penalties

DL 211 empowers the Resolutory Committee to apply fines of up to US$ 40 000 or US$ 4 400 000, depending if the tax unit is taken as an annual measure, as we have already explained. This figure is being reviewed on the basis of a new project for reforming Chilean law that has been proposed by the FNE and the Ministry of the Economy, which aims at establishing a fine of 30 000 annual tax units, which would be the equivalent of a maximum sum of US$ 14 4000 000.

Additionally, the Commission can establish other measures, such as rendering void anticompetitive acts or agreements. These penalties are applied by the Competition Tribunal, after formal proceedings that take place before this special court.

Furthermore, DL 211 also contemplates a generic element of crime that consists of a prison sentence that goes from 61 days to five years for individuals or representatives of juridical entities that took part in anticompetitive conducts. These criminal procedures must be initiated by the Economic National Prosecutor (or the Regional Attorney's Office in the corresponding regions), with the authorisation of the

Commission, and are filed before a special Judge, a Magistrate of the Santiago Court of Appeals. Its decisions can be appealed to the Santiago Court of Appeals.

In both cases the burden of proof lies with the complainant, which is the Office of Public Economic Prosecution, or with the Regional Attorney. There exist no regulations that change this rule.

With regard to criminal sanctions, their rank are in general terms similar to the penalties established for other acts or conducts that infringe legally protected interests such as property, public faith and economic order.

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CONTRIBUTION FROM CHINA

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I. - COMPETITION LAW AND POLICY IN CHINA

1. Implementation of the Law for Countering Unfair Competition

The Law of the People's Republic of China for Countering Unfair Competition (hereinafter referred to as the Law for Countering Unfair Competition) was adopted at the Third Meeting of the Standing Committee of the Eighth National People's Congress on Aept.2,1993. The law consists of 33 articles in five chapters, which integrates substantial stipulations and procedural stipulations in one. It embodies a concentrated reflection of main contents of the existing competition legal system of China. The Law for Countering Unfair Competition prohibits the following eleven kinds of acts of unfair competition: (1) acts of engaging in market transactions by resorting to counterfeiting or confusing measures (Article 5); (2) acts of commercial bribery (Article 8); (3) acts of releasing false or misleading advertisements (Article 10); (4) acts of infringing trade secrets (Article 10); (5) acts of engaging in unfair lottery-attached sale activities (Article 13); (6) acts of injuring competitors' commercial credit or the reputation of his competitors' commodities (Article 14); (7) acts of public utility enterprises or any other businesses occupying monopoly status restricting competition (Article 7); (8) acts of abusing administrative powers to restrict market competition (Article 7); (9) acts of predatory pricing (Article 11); (10) acts of conducting tie-in sale of commodities (Article 11); (11) acts of collusive tendering (Article 15). In addition to the Law for Countering Unfair Competition, there are other laws or regulations that touch upon the matter of competition from different perspectives and different sides. For instance, the Law on the Protection of Consumer Rights and Interests (1993) prohibits unfair competitive acts of infringing the legitimate rights and interests of consumers; the Pricing Law (1997) prohibits unfair pricing acts such as fixed pricing; Law on Tender Invitation and Bidding (1999) prohibits acts of colluding with each other in bidding; the Stipulations of the State Council on Prohibiting Regional Blockade in Market Economies prohibits acts of regional blockade.

As the execution organ of the Law for Countering Unfair Competition, the administration authorities for industry and commerce at all levels have done the work as follows in recent years:

(1) **Carrying out in a deep-going way the publication of the Law for Countering Unfair Competition, strengthening legal consciousness of business operators and consumers and creating a favorable social environment for maintenance of fair competition.** The State Administration for Industry and Commerce carried out a large-scale publication activity of "Countering Unfair Competition All Over China" together with relevant departments and more than fifty news media and made follow-up reports of typical unfair competition cases. The administration authorities for industry and commerce at all places also organized and developed various kinds of publication activities in recent years, enhanced the understanding of business operators and consumers with regard to the Law for Countering Unfair Competition, increased the legal consciousness of business operators to standardize their operating activities of their own free will and motivated the initiative of business operators, consumers and all circles of the society to supervise unfair competitive acts.

(2) **Gradually perfecting organizations and training law-enforcement officers so as to provide organizational protection to the implementation of the Law for Countering Unfair Competition.** The administration authorities for industry and commerce are important functional departments in the supervision and administration of markets in China, which undertake important obligations of standardizing and maintaining the market order. There is the State Administration for Industry and Commerce directly subordinate to the State Council at the central level and the administration authorities for industry and commerce at the provincial, municipal and county levels. In order to do a better job in the enforcement of the Law for Countering Unfair Competition, in 1994, the State Administration for Industry and Commerce established the Fair Trade Bureau in charge in the implementation of the Law for Countering Unfair Competition. Later, local administration bureaus of industry and commerce at all levels also established correspondent law-enforcement organs in charge of the execution of Law against Unfair Competition in their own jurisdictions. As of the end of 2000, there were 68,000 people engaged in the law enforcement of fair trade in China. At the end of 2000, the State Council decided to carry out significant reform in the system of the administration authorities for industry and commerce and implemented vertical administration under the provincial level, that is, municipal and county administration authorities for industry and commerce would be administered under the unified leadership of provincial administration authorities for industry and commerce and would not be subordinate to local governments any longer. In March 2001, the State Council decided that the State Administration of Industry and Commerce would be renamed as the State General Administration of Industry and Commerce, which was promoted from the vice ministerial level to the principal ministerial level for the purpose of further strengthening the authority and position of market supervision enforcement departments. In April 2001, the State Council decided to carry out an important enforcement campaign of "strengthening and standardizing the order of market economy" within the whole country in a concentrated manner. Of the significant task is to break through sector monopoly and regional blockade, hold down various unfair competitive acts, in which the administration authorities for industry and commerce are required to play an important role.

(3) **Making great effort to prevent unfair competitive acts and actively investigating unfair competition cases.** Ever since the Law for Countering Unfair Competition came into force in December 1993, the administration authorities for industry and commerce in the whole country have investigated and dealt with nearly 100 thousand unfair competition cases, of which, 4000 cases in 1994, 8600 cases in 1995, 11300 cases in 1996, 12600 cases in 1997, 14600 cases in 1998, 18100 cases in 1999 and 26053 cases in 2000. In order to lay stress on the key points and reinforce the strength of law enforcement, the State General Administration of Industry and Commerce defined the key points of law enforcement according to market situations. In 2000, the State Administration for Industry and Commerce also organized and carried out a special rectification campaign of "countering administrative barriers and acts of restricting competition by public utility enterprises", through which remarkable results were achieved. In 2000, the administration authorities for industry and commerce in the whole country investigated and dealt with 56 cases of administrative barrier, more than 460% than 1999, and 785 cases of restricting competition by public utility enterprises, more than 81% than 1999.

2. Major Problems of China's Competition Legal System

(1) **No legal stipulations on the definition of monopoly.** Though Chinese laws and regulations about competition often stipulate "to prohibit monopoly", there is no law that defines the connotation and denotation of the concept of "monopoly". And there is no law that makes stipulations on the following matters: in what scale will an enterprise constitute "monopoly"? What acts conducted by an enterprise having a monopoly position constitute "abusing its monopoly position"? How will legal measures be taken to prevent an enterprise expand its scale without any limitation? As there are no stipulations on

the problems mentioned above, it is difficult to evaluate legally some phenomena in the actual economic activities.

(2) **Incomplete stipulations on restrictive agreements**. With regard to the acts of collusion of business operators and their acts of restricting competition, there are only the Law for Countering Unfair Competition and the Pricing Law have some stipulations on "colluding with each other to force up or down the bidding prices" and "colluding with each other in pricing". But as to restrictive agreements in the aspects of "sales regions", "sales customers", "boycott" and "maintaining resale prices", there are no legal stipulations yet. However, such cases are often reported. For instance, at the beginning of 1993, ten brickyards in a city reached an agreement after consultation to reduce 30% of their production and mutually determine a minimum selling price (see Legal Daily, May 31, 1993). In April 1999, under the pressure of more than ten trade competitors of Shandong Jinan Guangming Machinery Co., Ltd., the organizing committee of "99's China Exhibition of Tube and Panel Products and Machinery for Construction Doors and Windows" was forced to refuse to provide Shandong Jinan Guangming Co., Ltd. the exhibition stand originally arranged for it (see China Industrial and Commercial Paper, April 3, 1999). On May 23, 1999, eight color picture tube manufacturers whose output exceeded 90% of the total amount of color picture tubes in China jointly made a decision that "beginning from June 28, 1999, they will stop production for a month and reduce the output by three million tubes" (see Beijing Youth Daily, May 28, 1999).

(3) **Weak control over administrative monopoly.** With regard to "administrative monopoly", though there are some stipulations in the Law for Countering Unfair Competition and other laws and regulations, for lack of strict regulatory mechanism and effective legal restriction, it got very little effect. After the implementation of the Law for Countering Unfair Competition, a certain places in a certain provinces adopted local protectionism for selling of beer and restricted the selling of beer of other places in the local markets. After many times of coordination by the administration authorities for industry and commerce of the province, it was rectified. Up to now, there are still some local governments that adopt regional blockade under the cover of protecting local interests. For example, some places and departments in Jiangsu Province rejected beer of other places on the false pretenses of quality supervision (see Legal Daily, April 23, 1999); Dianjiang County in Chongqing imposed additional taxes, fees and high-level fines on sellers of beer of other places under the cover of drinking "Love County Beer" (see Legal Daily, May 20, 1999).

(4) **Sector monopoly is still prominent.** Through the implementation of the Law for Countering Unfair Competition and reform of some sectors, sector monopoly has turned better but there is a certain gap compared with the requirements of market economy system. Some sector monopoly enterprises are still abusing their positions of natural monopoly or sector monopoly and implementing acts of restricting competition and unfair trade acts. According to an investigation made by China Consumers Newspaper in six cities (including Nanjing, Xi'an, Lanzhou, Zhengzhou, Wuhan and Guangzhou) in February,1999, there still existed such situation that sector monopoly implemented compulsory sales. Such sectors included gas, telecommunication, taxi, health care, fire control and so on. Commodities sold by these sectors generally had inferior quality at higher prices (China Consumers Newspaper, February 24, 1999).

(5) **Light punishment of unfair competition acts**. It is stipulated in the Law for Countering Unfair Competition that the maximum amount of penalty is only RMB200,000.00, which can not frighten business operators and is not suitable to the situation of economic development any longer. There are no provision of administrative penalty on some unfair competition acts (such as tie-in sales and dumpling) in the for Countering Unfair Competition. Penalties imposed on some unfair competition acts are calculated on the basis of illegal gains but such illegal gains are usually difficult to calculate.

(6) **Relatively weak law-enforcement measures taken by competition authorities in charge of competition**. If compared with foreign authorities in charge of competition, the law-enforcement measures taken by China's competition authorities in charge of competition are not weak. For example, China's competition authorities in charge of competition can directly exercise power of administrative penalties while foreign competent authorities in charge of competition can only do it upon decisions of the court. But with respect of China's social and economic environment, those measures taken seem to be weak. It shall face a great number of market entities (by the end of 2000, there were 5.35 million enterprises with domestic investment, 200,000 enterprises with foreign investment, 1.76 million private enterprises and 25.71 million small industrial or commercial businesses), while these market subjects often have low legal accomplishments and sometimes do not cooperate with the law enforcement. On the other hand, under the circumstances that courts can not enforce their own cases, it is difficult for them to assist administrative authorities to enforce relevant cases.

(7) **Overlaps between laws**. They are mainly overlaps between duties of execution organs and overlaps between liabilities of illegal acts. In respect of overlaps between duties, it is stipulated in the Law for Countering Unfair Competition that "supervision and inspection departments at or above the county level may carry out supervision over and inspection of unfair competition acts. Where it is stipulated by laws that supervision and inspection shall be carried out by other departments in laws and regulations, such stipulations shall be followed". However, it is stipulated in Telecommunication Rules that "where an enterprise conducts unfair competition in operating activities of telecommunication businesses, it shall be ordered to make corrections by competent authorities of the information industry under the State Council or telecommunication administration organs of provinces, autonomous regions and municipalities and a fine of not less than RMB100,000 but not more than 1 million may be imposed on the enterprise. Where the circumstances are serious, the enterprise shall be ordered to stop doing business and made rectification".

With respect to overlap of liabilities of illegal acts, it is stipulated in Article 27 of the Law for Countering Unfair Competition that "when bidders act in collusion with each other to force up or down the bidding price, or a bidder colludes with a tender-inviter for the purpose of pushing out their competitors, the successful bid shall be invalid, and the supervision and inspection department may impose a fine of not less than RMB10,000 but not more than RMB200,000 in light of the circumstances". For the same act, different stipulations are made in Article 53 of the Law on Tender Invitation and Bidding, "where bidders act in collusion with each other or the tender-inviter, the successful bid shall be invalid and a fine of not less than five percent and not more than ten percent of the amount of the successful bid; where there are illegal gains, the illegal gains shall be confiscated; if the circumstances are serious, the bidder's qualification of bidding for tender-invitation projects may be revoked for one or two years and announcements shall be made accordingly until its business license is revoked; where the case constitutes a crime, criminal responsibilities shall be investigated according to law".

3. Disputed Problems in the Formulation of Anti-Monopoly Law

After the Law against Unfair Competition was promulgated in 1993, China prepared to formulate the Anti-Monopoly Law of China. At the beginning of 1994, it was determined in the Legislation Plan of the Standing Committee of the Eighth National People's Congress that the Anti-Monopoly Law shall be formulated and the State Trade and Economic Commission and the State Administration for Industry and Commerce were authorized to jointly draft the law. In May 1994, the leadership group and the drafting group of the Anti-Monopoly Law were formally set up. After the setup of the drafting group, it concentrated its energy on collection of materials, research and investigation. On such basis, the Anti-Monopoly Law (the first version of the outline of the draft) was formulated. Ever since 1998, the making of anti-monopoly law attracted more and more attention. In November 1998 and December 1999, the

drafting group and OECD jointly held international workshops on making of anti-monopoly law twice. On the two workshops, domestic and foreign experts, scholars and government officials concerned with the making of anti-monopoly law had lively discussions on the making of China's anti-monopoly law. According to opinions and suggestions of people concerned, the Anti-Monopoly Law (outline of the draft) was revised for many times. In October 1999, OECD also invited main members of the drafting group to go to the head office of OECD in Paris to make discussions with experts of OECD Competition Committee. In June 2000, the drafting group revised the Anti-Monopoly Law (outline of the draft) and formulated the Anti-Monopoly Law (draft for soliciting opinions) and sent it to relevant departments. From June to September, the drafting group successively held a series of seminars to listen to opinions of relevant departments, enterprises and regions on the Anti-Monopoly Law (draft for soliciting opinions).

According to the feedback from all sides, the disputed problems are mainly in the following aspects:

(1) **On key points and scope of the anti-monopoly law**. There are different reasoning when it is considered from different starting points:

i) From the starting point of entering WTO and adapting to the globalization, protecting domestic consumers and enterprises from being harmed by multinational monopolistic enterprises, the emphasis shall be laid on standardizing acts of large enterprises especially multinational enterprises, but not applicable to natural monopoly trades formed in the process of reform.

ii) From the starting point of promoting reform and realizing social economic welfare, natural monopoly sectors shall be included in the anti-monopoly law so as to promote the process of reform.

iii) From the starting point of eliminating corruption and creating a market environment of fair competition, emphasis shall be laid on standardizing administrative monopoly.

iv) From the starting point of establishing and perfecting market economic system, a comprehensive competition law shall be formulated.

(2) **On principles and particularities**. One opinion is that China is still in the process of transformation from planned economic system to market economic system, it is not the time to establish an exhaustive anti-monopoly law. The law shall first make some general stipulations on some principles so as to maintain the stability of the legal norms of anti-monopoly. At the same time, it shall authorize anti-monopoly authorities to work out detailed operating standards according to the actual circumstances in the execution of the law. Another opinion is that China has determined to carry out a market economy, it shall fully make use of experiences of countries with developed market economies and formulate an exhaustive anti-monopoly law so as to promote the establishment and perfection of the market economic system as well as avoid the arbitrariness of anti-monopoly authorities in the enforcement of the law.

(3) **On the definition of "monopoly"**. One opinion is that as one of the direct purposes of the anti-monopoly law is to prohibit monopoly, it shall give a definition to "monopoly" so as to conform to people's habit of reasoning and the definition shall be highly abstract and generalized which can cover all kinds of monopolistic phenomena. Another opinion is that as there is already a definition of "monopoly" in economics, if the law circle gives a derogatory definition to it, it will arouse different interpretations. Besides, the phenomena of monopoly in China are so complicated that it is difficult to cover all types of monopolistic phenomena with one definition. So it is better to make a list of all types of monopolistic phenomena and attach basic stipulations to them.

(4) **On administrative monopoly.** One opinion is that administrative monopoly is the specific phenomenon in the process of transformation of China's economy and administrative monopoly will naturally decrease with the gradual deepening of the reform of economic system and political system. Besides, it is actually a process of transforming functions of governments and deregulation to break through administrative monopoly. If it is compulsorily included in the anti-monopoly law to rectify the phenomenon, it is difficult to design technical measures. Another opinion is that what affects the fair competition on China's market is mainly various types of administrative monopolies, the anti-monopoly law will not conform to China's reality if it does not solve the problem of administrative monopoly.

(5) **On control of natural monopoly.** One opinion is that the anti-monopoly law shall stipulate exceptive clauses about sectors (such as power network, pipeline network, wire network and airlines) with a nature of natural monopoly in natural monopoly, whose supervision shall be strengthened by relevant regulatory authorities. For sectors without a nature of natural monopoly (such as power plants, water supply plants, network service providers, transportation companies and so on), a competition mechanism shall be introduced and such sectors shall be included in the scope of adjustment. Another opinion is that the anti-monopoly may apply excepted clauses to natural monopoly or give an extension period to natural monopoly industries after which the anti-monopoly law shall apply.

(6) **On intellectual property**. Opinion is that the anti-monopoly law shall give exemption to acts of exercising intellectual property. Another opinion is that the exercise of intellectual property shall be treated differently. For acts of granting permits vertically, they may be exempted; but for cartel-like restrictive and exclusive acts and acts or mergers that have negative effects on technological renovation, they shall be investigated and evaluated by applying the rule of reason.

(7) **On competition authorities.** One opinion is that the anti-monopoly law shall create a national anti-monopoly committee that will implement unified competition rules on the market all over China. Another opinion is that as China has a vast territory and the levels of economic development in different regions are not balanced and there are a number of regional markets, on the basis of such a reality, the anti-monopoly law shall design two sets of competition authorities at the central level and the local level and define the scope of their powers and their relations.

(8) **On coordination of the anti-monopoly law and other laws**. One opinion is that as an "economic constitution", the anti-monopoly law shall have high authority and comprehensiveness and shall possibly define all sides of market competition rules. Other legal norms concerned with competition (such as the Law for Countering Unfair Competition, Pricing Law, Law on Tender Invitation and Bidding and other trade regulatory laws) shall not contravene the anti-monopoly law. Another opinion is that legal norms concerned with competition passed before the promulgation of the anti-monopoly law shall be duly respected and maintained a continuity. And the anti-monopoly law shall not contravene these legal norms.

Finally, I want to point out that in the process of drafting China's anti-monopoly law, the OECD, the World Bank, the UNCTAD and some countries including the United Nations, Germany, Japan, France, South Korea, Australia and Russia provided fund or technical assistance to the making of China's anti-monopoly law. I would like to extend our sincere thanks to all countries and international organizations that are concerned with and have provided support to the making of China's anti-monopoly law on behalf of the drafting group.

At present, the drafting group is carefully studying the feedback opinions and proposals of all sections. The drafting group will also make further investigations and studies on the difficult and key

problems by several special subjects in the process of making the anti-monopoly law. We hope we will get more supports and help from countries and international organizations concerned.

II. – DESCRIPTION OF CASES

1. Case One : Bid-rigging (Lichuan Company – Desheng Company)

On October 9, 1998, Jiangxi Lichuan County Construction Company (a third grade construction enterprise, hereinafter referred to as "Lichuan Company") and Jiangxi Desheng Construction Company (a fourth grade construction enterprise, hereinafter referred to as "Desheng Company") signed an agreement. It was stipulated in the agreement that Lichuan Company would act as the authorized agent of Desheng Company to exercise the operating right of construction engineering businesses and project management within the region of Lichuan County and pay Desheng Company management fees of RMB40,000 per year. Desheng Company would deliver its business license, qualification certificates, safety certificates and official seals to Lichuan Company to carry out business activities. The valid period of the agreement was from October 10, 1998 to October 10, 2001. After the signing of the agreement, Lichuan Company bid for construction projects in the name of "Lichuan Company" and "Desheng Company" at the same time for many times. As Lichuan Company could control two lower limits on bids, it won bids with a high rate. After the successful bidding, Lichuan Company will carry out the actual construction and settlement. In March 1999 and April 2000, Lichuan Company, Desheng Company and Lichuan County No. 2 Construction Company were chosen as candidates for the bidding of teaching building project of Houcun Township Middle School in Lichuan County and the comprehensive building project of the grain depot directly subordinate to Lichuan Grain Bureau Storage Company. As a result, Desheng Company won both of the bids. Huang Jianguo, the general manager assistant of Lichuan Company, signed contracts for undertaking construction projects with bidders in the name of the entrusted agent of Desheng Company. The actual construction and prepayment and settlement of project money were all operated by Lichuan Company. Since the signing of the agreement until April 2001 when the case was investigated, Lichuan Company paid Desheng Company joint management fee of RMB68,000.00.

The municipal administration for industry and commerce in Jiangxi Province considered that the joint management agreement signed between Lichuan Company and Desheng Company was essentially acts of buying out the operating right and squeezing out other competitors for the purpose of monopolizing the construction market in Lichuan County. Lichuan Company participated in bidding in the name of two companies, irrespective of any one who won the bids, the projects would be undertaken by Lichuan Company, which would also be confirmed by Desheng Company. Both companies formed a kind of collusion and constituted acts of collusive tendering. It should be dealt with the Law for Countering Unfair Competition. This case is being handled at present.

2. Case Two : Bid-rigging (Brickyard plant)

In July 1999, a township government in Zhejiang Province submitted public bid invitation for undertaking the operation of a brickyard plant of the town. According to the operating status, equipment and production facilities of the plant, it was determined that the operating period was three years and the minimum amount of the bid was RMB180,000.00. Bidders would compete against each other for the bid

on the basis of the minimum amount of RMB180,000.00. The bidder who quoted the highest price would win the bid and bid with an amount of lower than RMB180,000.00 would be invalid.

After the announcement was made, with Li Zaida, Zhuo Linji, Li Shouqian, Li Zelong and Wang Jinbiao as representatives, five groups would participate in the bidding. In order to force down the price, members of the five groups proposed to determine who would win the bid by drawing lots and they mutually decided that the bid winner would pay the other four groups RMB200,000.00 as a kind of compensation.

The evening before bidding, representatives of five groups gathered in the home of Zhuo Linji and held a ceremony of drawing lots. On one paper ball it was written “yes” and on the other four paper balls it was written “no”. Li Zaida drew the paper ball with the word “yes”. Representatives of the five groups agreed that Li Zaida group would win the bid and prepared a written agreement. It was stipulated that Li Zaida would pay RMB200,000.00 to the other four groups, RMB50,000.00 for each group. When the five groups formally bid for the brickyard plant, the bidding price of other four groups should not be higher than that of Li Zaida. Otherwise, the group whose bidding price was higher than that of Li Zaida should pay Li Zaida RMB200,000. On the next day, representatives of the five groups participated in the bidding and Li Zaida won the bid with RMB180,088.00.
It was considered by a municipal administration for industry and commerce in Zhejiang Province that the applicants colluded with each other to force down the bidding price, which had violated the stipulations of the Law for Countering Unfair Competition. Their acts were unfair competition acts. According to the Law for Countering Unfair Competition, the bureau announced that the successful bid was invalid and imposed a penalty of RMB50,000.00 on each of them.

3. Case 3 : Bid-rigging (Changding County School, Fujian Province)

The originally designed building area of a teaching building of a primary school in Changding County of Fujian Province was 645 square meters. In August 1998, the Preparatory Committee of the school signed a contract with Changding County No. 2 Construction Company. The total price of the contract was RMB190,600.00 and the price per square was RMB296.00. After the signing of this contract, No.2 Construction Company started the construction. As the undertaking for the construction of the project did not conform to the stipulations on the administration of construction projects, the Construction Engineering Leadership Group of Changding County Education Department and the Preparatory Committee of the school jointed announced that they would invite public bidding for the project. The original design plan was revised and the investment was increased. The construction area of the project was 813 square meters. The method for evaluating bids was as follows: the highest bidding price and the lowest bidding price would be rejected, the arithmetic average of all bidding prices would be the minimum amount for evaluating bids. Among bidder whose price fell within the range of more or less than 3% of the minimum amount, the bidder who quoted the lowest price would be the successful one. No. 2 Construction Company and other eleven construction units applied for bidding. After examination of qualifications, ten of them were chosen as candidates. In the morning of October 5, 1998, when the candidate units surveyed the spot, No. 2 Construction Company colluded with other 9 bidders that the bid winner would still be No. 2 Construction Company. No. 3 Construction Company would be responsible for calculating the bidding prices of all candidate units and No. 2 Construction Company would make economic compensation to the other units. Finally, all bidders quoted their prices according to the price calculated by No. 3 Construction Company and No. 2 Construction Company won the bidding with a price of RMB324.00 per square. The total costs were RMB263,574.00 and the unit price was RMB28.00more than the original price of undertaking for the project.
The administration for industry and commerce that was responsible for investigating the case considered that the ten units including No. 2 Construction Company had colluded with each other in the bidding and

made the following decisions according to the Law for Countering Unfair Competition and Measures of Fujian Province on the Administration of Construction Market: the successful bid was invalid and the construction of the project would be decided otherwise by the Education Bureau of the county and the Preparatory Committee of the school; the illegal gains of RMB9,000.00 of No. 2 Construction Company were confiscated.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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I. - COMPETITION LAW AND POLICY IN ESTONIA

By Aini Proos
Deputy Director General

The first Estonian Competition Act was adopted and Estonian Competition Board (ECB) was established in 1993. The second Competition Act was in force from October 1998 to October 2001. Starting from October 2001 we have our third Competition Act in force. In this new Act there are provisions on prohibited agreements, abuse of dominant position, merger control and State aid and we have harmonised all these principles with the relevant competition legislation of European Communities. Secondary legislation is of course still on the half way, since it is in the changing process in the EU also. During years 1993 to 2001 we had also unfair competition provisions in the Act, but now these cases are going directly to the court and the Consumer Protection Board deals with misleading advertising cases according to the Advertising Act.

This was a period of rapid changes both in economy and in legislation and we could see that implementing of completely new law is very difficult and it takes years because of the need to train partly unstable staff of the ECB and ministries. At the same time, the process of creating and changing legislation is taking place, considering also the practice in and outside of Estonia. When we had reached some progress with this work described before, we realised that knowledge of competition legislation had not extended to the working area of the judges. After this some judges were included in EU training programmes and they have taken part in competition seminars. After the first success in this area, the court reform took place in January 2001 and competition cases went instead of the administrative court now to the city court. So we were on the starting position with this training again since the target group of the judges had changed.

At the same time it was not possible to create any special Court or Council or Board, the decisions of which could not be appealed in the ordinary Court. There is a three level court system in Estonia and it takes usually 2 or more years to have the final decision by the court and there is no obligation to use previous court decisions. In practise our judges are fortunately considering previous decisions.

The ECB is under the administration of the Ministry of Finance, which means that the Minister decides over the budget and appoints the Director General of the ECB. Currently there are over 40 officials working at the ECB and we do not have any special council. The Director General or his Deputy can a) decide over the cases by themselves directly and these decisions could be appealed to the court or b) send the administrative offence report to the court that it could decide over the sanctions according to the Competition Act.

There is a Division in the Ministry which deals with the questions which ECB wants to discuss in the Ministry or on the Government level. In the ministries there are officials who are in the board of directors of big stock companies with state shares, which do not have a problem in the fulfilling of supervisory function of the ECB since the reasonable officials working there. All suggestions and drafts made by the ECB have to go through the Ministry of Finance and when the Ministry’s position will be sent on to the Government, the competition-side of the question may not reach the table for discussion. In the process of liberalisation and privatisation we could see that the ECB was not actively involved.

As we all know there are very big difference in lawyers salaries in state and private sector. The middle average salary per month and cost of private law firm services per 3 hours are at the same level in Estonia. In this situation part of the ECB budget for the purpose of the legal aid was not enough even for one court session of one big case in this year. This means that other big cases have to wait or we have to deal with these without the help of private law firms. It is well known that the countries in transition do not have enough resources to hire good lawyers, which means that in the court cases the state authority is on the weaker position than the persons who violated the law, especially big natural monopolies. As a conclusion of this situation we can say, that it is very important on what level we create a supervisory authority in order to make it independent one and there are the resources, what will determine the results of the work of an authority.

The ECB has handled the cases, where the undertakings who had violated a law, with negotiating and suggesting them to change the situation in the market and when this undertaking fulfilled the demand of the ECB, then there was not used any sanctions. In the case, when there was not possible to reach on the same understanding with the entrepreneurs, the decision of the ECB was appealed to the court. In this situation there were the first sanctions according to the Competition Act used in the end of 2000. The size of the sanction decided by court in the case of unlawful behaviour of one Bank was 40000 EEK (2200 euros); this shows the attitude of courts to the implementing of the Competition Act.

There are the provisions in the Competition Act according to which the ECB has the right to acquire all information but it has not been supported by police activity or Court order so far, but there are changes taking place concerning the Estonian legislation where sanctions are provided. There are proposed two options for determinating the size of the sanction: a) to limit it with amount of money or b) to account it from the view of losses. In case of the possibility a) - there was the same small limit to all sanctions (taxes, competition, etc.), what is not enough in competition cases. In case of the option b) - there are no institutes or scientists in Estonia, who would calculate these losses and no enough budget of the ECB to buy this kind of analysis. There are the problems of direct and indirect effect of violation of the Competition Act in the different product markets and of course there are smaller direct losses than indirect ones.

In the only court case where there was defined the losses of one party from the violation of the Competition Act by other party, there was not accounted indirect effect by the court. There was not taken into account that other party had taken over whole market and it took 2 and half years to reach the court decision. Then if we take as an example the case where the entrepreneur has not notified about merger taking place there is not direct effect to the market and it is unclear how we could find the amount of sanction in this case.

Some provisions of our new Competition Act

There is a short market definition in the Competition Act (art.3):

“Product market means an area in the whole territory of Estonia or a part thereof where goods or services which are regarded as interchangeable or substitutable by the buyer by reason of price, quality, technical characteristics, conditions of sale or use, consumption or other characteristics are circulated.” So far this definition has functioned quite well and when we tried to improve it, we understood that it would be too long for one Act and there is a need to make a separate document relating to this question to explain all sides of it.

In the Competition Act there are the prohibitions of the agreements between undertakings, concerted practices and decisions by associations of undertakings, which have their object or effect the

restriction of competition (art.4). This rule has one general exemption: this article does not apply to agreements and practices of farmers or to decisions by associations of farmers, which concern the production or sale of agricultural products or the use of joint facilities, unless competition is substantially restricted by such agreements, practices or decisions and of course "the price cartel" is always prohibited.

There is a possibility to use block exemptions or to request an individual exemption for prohibited agreement. Block exemptions are described in the regulations of the Government and the undertakings can use them directly. Individual exemption is a permission which can be granted at the request of an undertaking by a decision of the Director General of the ECB or his Deputy for entry into an agreement, engagement in concerted practices or adoption of a decision, which are generally prohibited by rticle4 of the Act

The undertaking in a dominant position in the meaning of the Competition Act is an undertaking which accounts for at least 40 per cent of the turnover in the product market or whose position enables the undertaking to operate in such market to an appreciable extent independently of competitors, suppliers and buyers. We have had this 40 per cent line because of the small scale of Estonian market and in most of the cases we have used it. Only in few cases we have looked at the other part of the definition because it is very difficult to define what position have enabled to operate independently and to what extent it is appreciable. We do not have the principle of joint dominance in our Act because we look at this kind of activity from the side of an agreement or concerted practice.

It is prohibited to abuse dominant position in the market including the position where the undertakings have the special or exclusive rights or control over an essential facility (art.16).

Undertakings with special or exclusive rights or in control over an essential facility shall permit access to the network, infrastructure or other essential facility by other undertakings under reasonable and non-discriminatory conditions for the purposes of supply or sale of goods and draw a clear distinction in accounting between primary and secondary activities (for example production, transportation, marketing and other activities of the undertaking) thereby ensuring the transparency of accounting (art.18). These obligations are general ones and most of them are included in special Acts (. as an example in Energy Act), but in areas where no special Act exists, we can apply the Competition Act.

Before October 2001 the undertakings were obliged to notify concentrations to the ECB before taking place. The ECB could not permit or prohibit the mergers; it just received the notices for the purpose of collecting information and other documents concerned. The undertaking had to submit the certificate issued by the ECB to the Commercial register upon receipt of the required information. Such an obtaining of information was good practise before imposing full control with an obligation of prior notification. The obligation to notify had been implemented since October 1998 and the ECB has analysed over 100 merger notices during this period. Most of the mergers have taken place in industry, especially in energetic and transport sector. Other cases have been in banking, insurance, telecommunication, trade and services sector and in some other sectors. The mergers have mostly concerned foreign undertakings acquiring decisive influence over local undertakings both directly and through subsidiaries. The foreign companies were mostly from Nordic countries but also from Netherlands and USA. In very rare cases we have been notified of mergers abroad when merging party has a subsidiary in Estonia.

During this year the main goal was and still is to enforce the new Act in order to implement full merger control as soon as possible.

Starting from 1st October 2001 the Director General of the ECB or his Deputy may prohibit a concentration if it creates or strengthens a dominant position as a result of which competition is significantly restricted in the product market (art.22). A concentration shall be subject to control if (art.21):

1. during the previous financial year the aggregate worldwide turnover of the parties to the concentration exceeded 500 million EEK and

2. the aggregate worldwide turnover of each of at least two parties to the concentration exceeded 100 million EEK and

3. the business activities of at least one of the merging undertakings or of the whole or part of the undertaking of which control is acquired are carried out in Estonia.

Concentration is deemed to arise where (art.19):

1. previously independent undertakings merge within the meaning of the Commercial Code;

2. an undertaking acquires control of the whole or part of another undertaking;

3. the undertakings jointly acquire control of the whole or part of a third undertaking;

4. a natural person already controlling at least one undertaking acquires control of the whole or part of another undertaking;

5. 5) several natural person already controlling at least one undertaking jointly acquire control of the whole or part of another undertaking.

A concentration subject to control shall be notified to the Competition Board within one week after (art.25):

1. the entry into the merger agreement;

2. the acquisition of control;

3. the acquisition of joint control;

4. the announcement of the public bid of securities.

There are the supervisory functions divided between two authorities in the Competition Act: State aid issues are the responsibility of the Ministry of Finance and competition is the responsibility of the Competition Board. Until October 2001 there was the situation where the supervision in respect of credit institutions, securities intermediates and insurance companies were carried out by state supervisory bodies in the relevant field, while the Competition Board was entitled to present viewpoints of recommendatory character. In fact there was only few activities of these bodies in the competition matters in finance sector in this period. Now the Competition Board shall supervise in all areas, this means that the financial sector is also included.

The Competition Board is the authority with powers to:

- investigate the abuses of dominant position and the agreements restricting competition on its own initiative or upon applications submitted to the Board,

- give the exemption to an agreement where the Board finds that the agreement is in accordance with the conditions laid down in the Competition Act,

- examine and analyse the situation of competition in different markets for goods and services and make recommendations to improve the situation of competition,

- prepare measures facilitating competition and to make proposals for the amendment of legal acts,

- make the decisions on competition cases or administrative offence reports for the court,

- prohibit the mergers,

- issue the mandatory precepts.

Our new Act includes some new possibilities for the ECB to investigate cases:

1. After receiving a complaint we have 30 calendar days to decide, whether to commence proceedings of the matter or to refuse to commence if the proceeding in this case is not within the competence of the Board or it is clear, that the Competition Act has not been violated.

2. To have better results in cartel investigation cases we added the leniency procedure: an administrative offence report shall not be drawn up on a person who was the first to notify on a prohibited agreement, decision or practice where such person was not the initiator of such agreement, decision or practice and has cooperated with Competition Board in the proceeding of the matter. We hope this procedure will help us a lot to get the evidences in cartel cases.

3. There are criminal sanctions included now, but there is an open question, how to share the investigative powers with the Economy Police.

In almost all cartel cases investigated there are companies not only from Estonia and the prohibited agreements, decisions or practices, if these exist, have probably not been made in Estonia. We have been in a very tight position in the investigation period because of the obligation to keep business secrets of companies. There are mainly two open questions:

- Whether the Competition Authority of one country can inspect the entrepreneurs of the same country in order to complete investigation of the case of other country's Competition Authority?

- Whether the Competition Authority of one country can inspect the entrepreneurs of other country?

Competition Board activities in figures in 2000

Restrictive agreement or concerted practice Incl. Investigations on different product markets	17
Business activity of an undertaking dominant in the market Incl. Investigations on different product markets	19
Unfair competition	6
Mergers notifications	29
Refusing to investigate	31
Total:	102

II. - CARTEL CASES IN ESTONIA

Milk processors (producers) and wholesalers case (09/00)

The Competition Board started an investigation since there was information that on 28th January 2000 the leading milk processors and wholesalers of milk products in Estonia met in Rakvere (city in North-East Estonia) with a purpose to agree in reduction of sell-off and purchasing prices of milk products.

The Competition Board carried out an investigation and found out that the information regarding the meeting between the four leading milk processors and ten wholesalers of milk products was correct. With further investigations and by explanations inquiries, it cleared out that during the meeting the issue in question was to stop price war and to reach an agreement not to lower sell-off prices any more. There is one processor that lowered the sell-off prices significantly started "the price war" and others followed. In addition to this the deduction rates (wholesalers earn from the percent in sell-off price) were discussed during this meeting with wholesalers, as they were interested about higher deduction percent while sell-off prices were decreased. There were no discussions during the meeting about lowering purchasing prices of raw milk. No agreement was concluded during the meeting.

Milk processors and wholesalers itself had the financial losses from the price war during time the sell-off prices were reduced, because no reduction in purchasing prices of raw milk was made, processors sold so cheap and wholesalers earned fewer when the sell-off prices were lower. At the present time the situation has normalised, since the sell-off prices have increased to a reasonable level. Market shares have remained quite stable.

According to Article 3 (1) of the Competition Act, a market is an area in the whole territory of Estonia or a part thereof in which goods which are regarded as interchangeable by the buyer by reason of price, quality, technical characteristics, conditions of sale or use, consumption or other characteristics are circulated. The market in this case was defined as milk product sales market in the territory of Estonia.

According to Article 4 (1) of the Competition Act, contracts, other transactions and agreements or concerted practices, which have as their object or effect the restriction, prevention, limitation or distortion of free enterprise and competition are prohibited. According to Article 4 (1) (5) of the Competition Act, such agreements or activities are deemed to restrict competition if they directly or indirectly disseminate information, which distorts competition.

Information exchange about sell-off prices of milk products influenced the behaviour of the processors, as competitors being aware of the others market behaviour, acted similarly. With giving out information about the future behaviour, it became possible for processors to react quickly to the changes in the market, it means to act similarly with competitors. Since during the meeting processors and wholesalers discussed the deduction rates this kind of information exchange between wholesalers as competitors makes possible to predict each others deduction rates and it influences market situation. Also, the concerted practices of the entrepreneurs on different economic level might lead to establishment of similar prices.

The exchange of the information, which distorts competition freedom, is the prohibited activity by Article 4 (1) (5) of the Competition Act.

Article 5 (1) (1) of the Competition Act states that agreements or concerted practices are deemed not to restrict, prevent, limit or distort competition such that free enterprise may be distorted if the combined significance of the parties entering into an agreement or developing concerted practices does not exceed 5 per cent of the turnover of the market influenced by such agreement or concerted practices. In this case the combined significance of the parties (turnover) is 50%, that is the reason why Article 5 (1) (1) of the Competition Act does not apply.

The Competition Board terminated the case by establishing an infringement of the Competition Act since during the Rakvere meeting in 28th January 2000 the information, which may distort competition was exchanged. The Competition Board made a mandatory prescription to the entrepreneurs who participated in the meeting and while being active at the same market not to organise or participate at the meetings which have the purpose or consequence to get information from processors or wholesalers about milk product prices or planned changes in prices.

Case of the taxi services in Pärnu (13/99)

Based on the information published in newspapers concerning concerted practice of taxi companies on the territory of Pärnu city in determining prices, the Competition Board initiated the proceeding of the matter of Pärnu taxi services with a purpose to investigate violation of Article 4 (1) (1) of the Competition Act.

Legal entities providing taxi services and sole proprietors rendering taxi services in their own name were active on the Pärnu taxi services market as competitors. Subject of the proceedings was considered to be the legal entities rendering taxi services on whose behalf and under whose trademark the taxi services were provided. Such entities included taxi companies of Pärnu such as OÜ Pärnu Takso, OÜ E-Takso, OÜ Bristol Takso, MTÜ Ranna Takso and OÜ Pärnu Tulika Takso. The share of the above companies accounted for ca 70% of the Pärnu taxi service market.

In the course of proceedings unannounced inspections were conducted, representatives of taxi companies, taxi drivers and dispatch clerks were interviewed, and in addition several written proof and materials were investigated. In the course of investigation no written agreements verifying the co-operation between companies were discovered. The analysis indicated that even though the mechanism of imposing tariffs for the services was varying and immediate providers of taxi services participated in the price formation, the prices valid on the product market were enforced by legal entities organising taxi services.

During the proceedings the formation of general tariff and discounted price of taxi services during May 1998 to May 1999 was analysed as well as the compliance of the activity of undertakings competing on the product market with the Competition Act. While in the beginning of the period under observation the general tariff of taxi services and the discounted tariff provided by loyal customer cards was relatively varied for different companies then in the beginning of April 1999 the undertakings enforced a common general tariff of 6 EEK/km. At the same time with changing of the general tariff OÜ Pärnu Takso implemented a discounted price of 5 EEK/km for producers of its customer cards. OÜ Pärnu Tulika Takso did not change the general tariff and continued to provide the services with a price of 5 EEK/km and did not apply the discounted price.

During the period from 1 May 1999 to 6 May 1999 Bristol Takso introduced for the first time and E-Takso and Ranna Takso reintroduced the loyal customer card providing price discounts, established similar discounted price of 5 EEK/km for loyal customer card owners and agreed on cross-use of such cards. The share of the above-mentioned legal entities accounted for a total of 45% of Pärnu taxi services market. E-Takso tried to further weaken the price competition of taxi services by repeatedly advertising in

a local newspaper that it applies a discounted price of 5 EEK/km to owners of loyal customer cards of all taxi companies in Pärnu.

The investigation verified the concerted practice of three companies – Bristol Takso, E-Takso and Ranna Takso – in implementation of a price giving uniform discount as a counterbalance to the activity of OÜ Pärnu Takso that had enforced a discounted price of 5 EEK/km to the owners of its loyal customer cards about a month before than its competitors.

In the article "Three taxi companies attacking Pärnu Takso" by Allan Tankler, published in "Pärnu Postimees" newspaper on 14 May 1999 the board member and Managing Director of OÜ E-Takso Endel Hiis commented the co-operation between OÜ E-Takso, OÜ Bristol Takso and MTÜ Ranna Takso and the introduction of cross-use of loyal customer cards by saying: "We, together with Bristol Takso and Ranna Takso came to the conclusion that the people of Pärnu deserve a discounted price".

A claim as if the cross-use of loyal customer cards allowing discounted price between three competing legal entities providing taxi services was favourable for the consumer of the service is false. In fact and especially in the long run it is favourable for the consumer if the providers of services compete among themselves with the discounted price for the service. Otherwise it is realistic that undertakings commonly enjoying dominant position in the market (over 40% of the product market) will, by using their relative independence from customers and competitors, soon raise both the discounted tariff and regular tariff to economically unfoundedly high level. The rest of the undertakings operating on the same product market that have smaller market share will follow their example in order to receive higher profits. Thus, such concerted practice may lead not only to weakening of price competition but even to ending of it and to implementation of unjustly high prices in relevant product market.

Having regard to the aforesaid and taking into consideration the fact that OÜ Bristol Takso, OÜ E-Takso and MTÜ Ranna Takso had set similar discounted prices, the introduction from May 1999 of cross-use of their loyal customer cards was a practice wherewith competing companies established similar discounted tariffs to be adopted for customers-owners of loyal customer cards of different companies. Such an activity can be qualified as anticompetitive concerted practice deemed to restrict, harm and limit price competition and is prohibited pursuant to Article 4 (1) (1) of the Competition Act. The Competition Board closed the proceeding of the matter by establishing a violation of law and made a mandatory precept to joint-stock companies Bristol Takso, E-Takso and the non-profit association Ranna Takso to end the cross-use of their loyal customer cards granting similar discounted tariffs.

On February 2000 the ECB compiled official report of the violation of law and submitted them to the court. By the decision of the Administrative Court from April 2000 the proceedings were closed due to the absence of essential elements of administrative offence. By the decision of the District Court from November 2000 the fines was imposed to 3 companies 10 000 EEK to each of them. By making of this decision the Court considered that the cross-use of client cards of competitors granting similar preferential tariffs lasted a short period and ended after the ECB made mandatory precept. The State Court did not change the decision in December 2000.

Case of the activity of the Association of Estonian International Road Carriers (03/00)

The Association of Estonian International Road Carriers (AEIRC) is the union, representing majority the respective industry. Besides representing the general interests of its members the Association performs several services, which are vital for its members and which cannot be or can be with significant difficulties obtained elsewhere. For example, the Association provides to the entrepreneurs with TIR carnets, CEMT-licences, performs certain VAT operations etc. For the above-mentioned reasons an entrepreneur who is not a member of the Association is in a considerably less favourable position.

At the moment of the infringement there were 1300 entrepreneurs with 3300 vehicles active in the Estonian international road transport sector. 450 of them with 2500 vehicles were members of the association. Therefore, the Association engaged 35% of the respective entrepreneurs having 76% of the vehicles. Insofar as the Association was not in the position to operate outside Estonia the geographical market was delineated as the whole of the country.

There was a special Commission established in October 1999 in order to analyse the cost of the transport service and to compile a uniform pricing policy. The Commission found, that considering all incurring costs an average cost price of the transport service to Western Europe could not be less than 10.40 EEK/km (Euro 0.67). Cheaper service can only be the result of the overloading of the vehicles, making the drivers work too long, tax evasion, ignoring safety requirements etc. Finally, the Commission proposed to exclude from the association the entrepreneurs who proved to violate the law in the described manner. The board of the AEIRC published the proposals by the Commission in the newspaper of the association and in the main business daily newspaper. Besides that, the board didn't take any further steps in order to implement the proposals.

The representatives of the AEIRC argued that the 10.40 EEK/km price level was meant to be a voluntary guideline in order to raise the consciousness of both the transporters and their clients. Moreover, the Association was planning to establish a system of guidelines, which was going to be based on the Finnish experience of price indexation. This price was presented as a calculation where all the possible costs were clearly indicated. The representatives of the AEIRC stated, that the calculation was meant to educate the smaller enterprises carrying out similar cost analysis. The representatives of the association were on the opinion that minimum price levels were vital in order to protect honest entrepreneurs from the ones who did not follow all the legal requirements. The minimum price level was supposed to indicate whether an entrepreneur is an honest one.

The proposals made by the Commission clearly indicated that the entrepreneurs performing the service at a lower price than 10.40 EEK/km were taken as not following all the legal requirements. Those entrepreneurs faced a potential threat of getting excluded form the Association. As far as it was profitable to be a member of the Association all the entrepreneurs had an incentive to have their price level at least 10.40 EEK/km. In that way the activities of the Association did fix pricing conditions and therefore restrict Competition.

There was announced by the AEIRC in the newspapers during the investigation process of the case, that there are no obligations to use any fixed price level and all entrepreneurs are free to choose the prices by themselves. There was made the decision of the establishment of an offence and there were no financial sanctions imposed.

Hawaii Express case (22/99)

Hawaii Express (HE) is leading distributing company of sports and leisure goods in Estonia. This case concerned only the bicycles distributed by HE. The company is the distributor of several well-known international brands. HE is also active in the retail level and uses the help of the dealers generally in the locations where there are no retail outlets of HE itself. At the moment of the investigation there were 16 dealers with whom HE had signed a contract.

The attention of the Competition Board was driven by an advertisement of the bicycles distributed by HE published in the main newspapers in 1999. The advertisement listed the bicycles distributed by HE together with retail prices. The advertisement also included the list of retail outlets from

which the products could have been obtained. The list included besides HE-s retail outlets also the ones of the dealers. It appeared from the advertisement that in all the retail outlets irrespective of their ownership the prices were exactly the same.

The Competition Board launched an investigation and HE was asked to present all the contracts it had signed with the dealers concerning the distribution on bicycles. From these contracts a retail price maintenance scheme appeared. All the contracts included provisions that fixed the retail price levels of the independent dealers. There were two forms of fixing retail prices. First, in the majority of the contracts the dealer was obliged to set prices equal or up to 5% higher than the ones effective in the HE's retail outlets. In that way a certain price corridor was created for the retailers. It must be mentioned, that with some rare exceptions all the retailers set their prices exactly to the same level as HE. Second, in one contract exact margins were specified for the retailer. As far as these margins equalled the ones used by the HE the prices of that retailer once again matched the ones of HE.

All the contracts between HE and the dealers included certain provisions of exclusivity. Majority of the contracts were exclusive distribution contracts with some territorial protections given to the dealer. The exclusive territories usually consisted of one county of Estonia (there are 15 counties in Estonia) or one city, but also of a suburb of Tallinn. A number of contracts were exclusive purchasing agreements in which the dealer was obliged to purchase the bicycles and some supplementary products only from HE. Four contracts limited the dealer's right to sell the respective products to a certain territory without offering the latter any exclusive protection towards the territory.

The relevant product market was defined as the one of bicycles and the relevant geographical market was defined as the whole of Estonia.

According to Article 5 of the Estonian Competition Act agreements that cover less than 5% of the market are not considered to restrict competition. The market share of HE was considerably above that level. At the same time it was clearly less than it is necessary for having a market dominating position.

All the investigated contracts included provisions that restricted the dealer's freedom of pricing, which were in a contradiction with the Competition Act.

The Estonian system of block exemptions matches the "old" system of EU. There are block exemptions for exclusive distribution and exclusive purchasing agreements. Most of the contracts did cope with the requirements of these block exemptions as far as exclusivity was concerned. Both block exemptions do not exempt agreements including resale price maintenance so that generally the contracts did not match the requirements of the block exemptions.

The four contracts that limited the territory in which the dealer had the right to operate without giving the latter any exclusive territorial protection were not the subject of any of the block exemptions. No contracts like these would have been exempted by a block exemption even if there were no provisions leading to resale price maintenance. Their respective provisions were in contradiction with the Competition Act, which forbids market sharing, including the sources of supply.

All the analysis in this case was based on the contracts signed between HE and the dealers. As far as the restricting activities were described clearly enough in these contracts, no further investigation was considered necessary. HE was given a time period to change the restricting provision found in the agreements and HE had done so. At the end we made the decision of the establishment of an offence and we did not impose any fine in February 2001.

III.- ANSWERS TO THE QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

A. General information on cases

Milk processors (producers) and wholesalers (09/00)

1(a) Each respondent's name, the covered product or service and geographic area, and the approximate beginning and ending dates of the cartel.

28th January 2000 the four leading milk processors and ten wholesalers of milk products in Estonia met in Rakvere (city in North-East Estonia) with a purpose to agree in reduction of sell-off and purchasing prices of milk products.

The market in this case was defined as milk product sales market in the territory of Estonia.

(b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence.

The Competition Board started an investigation by its own initiative based on an article that was published in an economic newspaper "Äripäev". It appears from the article that on 28th January 2000 the leading milk processors and wholesalers of milk products in Estonia met in Rakvere with a purpose to agree in reduction of sell-off and purchasing prices of milk products.

By explanations inquiries, it cleared out that during the meeting the issue in question was to stop price war and to reach an agreement not to lower sell-off prices any more. In addition to this the deduction rates (wholesalers earn from the percent in sell-off price) were discussed during this meeting with wholesalers, as they were interested about higher deduction percent while sell-off prices were decreased. No agreement was concluded during the meeting.

(c) Amount of commerce

According to the Statistical Office of Estonia in 1999 the value of production of milk products was 2 143 million Estonian crones. The combined significance of the parties participating in the meeting of 28th January 2000 was 1 094 million Estonian crones.

(d) Sanctions:

The Competition Board terminated the case by establishing an infringement of the Competition Act since during the Rakvere meeting in 28th January 2000 the information, which may distort competition was exchanged. The Competition Board made a mandatory prescription to the entrepreneurs who participated in the meeting and while being active at the same market not to organise or participate at the meetings which have the purpose or consequence to get information from processors or wholesalers about milk product prices or planned changes in prices.

2(a) The manager of one of the processors made a statement that meetings between the milk processors are regular. The purposes of these meetings are to get information about each other's

actions in the milk sector. He also said that in 1999 milk processors agreed that sell-off prices of milk products should be the same all over the country. The participants of 28.01.2000 meeting tried to reach an agreement not to lower sell-off prices of milk products any more and therefore maintain their market share.

The sales and marketing manager of another processor told that the purpose of the milk processors and milk wholesalers meeting was to disseminate information. During the meeting he made a statement that his company is interested to increase the sell-off prices at the milk, but has a necessity to reduce the sell-off prices of the milk as other processors have done so. The company was ready to increase the sell-off prices of the milk. He also said that the other processors present at the meeting were not interested about increasing the sell-off price of the milk.

Case of the taxi services in Pärnu

1(a) Each respondent's name, the covered product or service and geographic area, and the approximate beginning and ending dates of the cartel.

Three taxi companies OÜ E-Takso, OÜ Bristol Takso and MTÜ Ranna Takso issued loyalty cards and each agreed to accept the cards of the other two. The price discount for card holders was the same for all three companies.

The beginning date – Beginning of May 1999
The ending date- December 1999

Competition Board defined it for the purpose of this case covers the territory of Pärnu city and the goods traded in that market were taxi services.

(b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence.

In the course of proceedings unannounced inspections were conducted, representatives of taxi companies, taxi drivers and dispatch clerks were interviewed, and in addition several written proof and materials were investigated. In the course of investigation no written agreements verifying the co-operation between companies were discovered.

But there was an article "Three taxi companies attacking Pärnu Takso" published in "Pärnu Postimees" newspaper on 14 May 1999 the board member and Managing Director of OÜ E-Takso commented the co-operation between OÜ E-Takso, OÜ Bristol Takso and MTÜ Ranna Takso and the introduction of cross-use of loyal customer cards by saying: "We, together with Bristol Takso and Ranna Takso came to the conclusion that the people of Pärnu deserve a discounted price".

(c) Amount of commerce

The share of the three taxi companies accounted for a total of 45% of Pärnu taxi services market.

(d) Sanctions

Taking into consideration the fact that OÜ Bristol Takso, OÜ E-Takso and MTÜ Ranna Takso had set similar discounted prices, the introduction from May 1999 of cross-use of their loyal customer cards was a practice wherewith competing companies established similar discounted tariffs to be adopted for customers-owners of loyal customer cards of different companies. Such an activity can be qualified as anticompetitive concerted practice deemed to restrict, harm and limit price competition and is prohibited pursuant to Article 4 (1) (1) of the Competition Act. The Competition Board closed the proceeding of the matter by establishing a violation of law and made a mandatory precept to joint-stock companies Bristol Takso, E-Takso and the non-profit association Ranna Takso to end the cross-use of their loyal customer cards granting similar discounted tariffs.

On February 2000 the Estonian Competition Board compiled official report of the violation of law and submitted them to the court. By the decision of the Administrative Court from April 2000 the proceedings were closed due to the absence of essential elements of administrative offence. By the decision of the District Court from November 2000 the fines was imposed to 3 companies 10 000 EEK to each of them. By making of this decision the Court considered that the cross-use of client cards of competitors granting similar preferential tariffs lasted a short period and ended after the ECB made mandatory precept. The State Court did not change the decision in December 2000.

2. (a) The three companies that issued the new cards claimed that their purpose was only to offer more competition to their larger rival.

2. (b) Before the concerted practice within three taxi companies, they did not have loyal customer cards but only had a general tariffs. The three taxi companies introduced the loyal customers card after their biggest competitor implemented a discounted price in the beginning of April.

2. (c) The three taxi companies claimed that they have not concluded any agreements and the discounted price 5 EEK/km was incidental, they also argued that they were not aware that the cross use of loyalty cards could be a violation of Competition Act.

Association of Estonian International Road Carriers (AEIRC) case

1 (a) Each respondent's name, the covered product or service and geographic area, and the approximate beginning and ending dates of the cartel.

The Association of Estonian International Road Carriers (AEIRC) is the union, representing majority the respective industry. Besides representing the general interests of its members the Association performs several services, which are vital for its members and which cannot be or can be with significant difficulties obtained elsewhere. For example, the Association provides to the entrepreneurs with TIR carnets, CEMT-licenses, performs certain VAT operations etc.
The relevant geographical market was defined as the whole of Estonia.

The beginning date:

- In October 1999 a special Commission established in order to analyze the cost of the transport service and to compile a uniform pricing policy. The Commission found, that

considering all incurring costs an average cost price of the transport service to Western Europe could not be less than 10.40 EEK/km (Euro 0.67).

The ending date:

– In April 2000, during the investigation process of the case the AEIRC announced in the newspapers that there are no obligations to use any fixed price level and all entrepreneurs are free to choose the prices by themselves.

(b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence.

The board of the AEIRC published the proposals by the Commission in the newspaper of the association and in the main business daily newspaper. Besides that, the board didn't take any further steps in order to implement the proposals.

(c) Amount of commerce. Price fixing lasted during the short period and the monetary value of service affected by cartel wasn't remarkable.

(d) Sanctions. There was announced by the AEIRC in the newspapers during the investigation process of the case, that there is no obligation to use any fixed price level and all entrepreneurs are free to choose the prices by themselves. There was made the decision of the establishment of an offence and there were no financial sanctions imposed.

2.

2 (a) The Commission found, that considering all incurring costs an average cost price of the transport service to Western Europe could not be less than 10.40 EEK/km (Euro 0.67). Cheaper service can only be the result of the overloading of the vehicles, making the drivers work too long, tax evasion, ignoring safety requirements etc The representatives of the AEIRC argued that the 10.40 EEK/km price level was meant to be a voluntary guideline in order to raise the consciousness of both the transporters and their clients.

2. (b) The Commission was established to analyze the cost of the transport service and to compile a uniform pricing policy. The Commission made only the proposals. The AEIRC published the proposals, but after that the board didn't take any further steps in order to implement the proposals.

2. (c) The Association was planning to establish a system of guidelines, which was going to be based on the Finnish experience of price indexation. This price was presented as a calculation where all the possible costs were clearly indicated. The representatives of the AEIRC stated, that the calculation was meant to educate the smaller enterprises carrying out similar cost analysis. The representatives of the association were on the opinion that minimum price levels were vital in order to protect honest entrepreneurs from the ones who did not follow all the legal requirements. The minimum price level was supposed to indicate whether an entrepreneur is an honest one.

2 (d) There wasn't any other dramatic demonstration of cartels' harm.

Hawaii Express case

1(a) Each respondent's name, the covered product or service and geographic area, and the approximate beginning and ending dates of the cartel.

Hawaii Express (HE) is leading distributing company of sports and leisure goods in Estonia. This case concerned only the bicycles distributed by HE. The company is the distributor of several well-known international brands. HE is also active in the retail level and uses the help of the dealers generally in the locations where there are no retail outlets of HE itself. At the moment of the investigation there were 16 dealers with whom HE had signed a contract.
The relevant product market was defined as the one of bicycles and the relevant geographical market was defined as the whole of Estonia.

(b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence.

The attention of the Competition Board was driven by an advertisement of the bicycles distributed by HE published in the main newspapers in 1999. The advertisement listed the bicycles distributed by HE together with retail prices. The advertisement also included the list of retail outlets from which the products could have been obtained. The list included besides HE-s retail outlets also the ones of the dealers. It appeared from the advertisement that in all the retail outlets irrespective of their ownership the prices were exactly the same.
All the contracts between HE and the dealers included certain provisions of exclusivity. Majority of the contracts were exclusive distribution contracts with some territorial protections given to the dealer. The exclusive territories usually consisted of one county of Estonia (there are 15 counties in Estonia).

(c) Amount of commerce

According to Article 5 of the Estonian Competition Act agreements that cover less than 5% of the market are not considered to restrict competition. The market share of HE was considerably above that level. At the same time it was clearly less than it is necessary for having a market dominating position.
All the analysis in this case was based on the contracts signed between HE and the dealers. As far as the restricting activities were described clearly enough in these contracts, no further investigation was considered necessary.

(d) Sanctions All the investigated contracts which included provisions that restricted the dealer's freedom of pricing, were in a contradiction with the Competition Act.

HE was given a time period to change the restricting provision found in the agreements and HE had done so. At the end Competition Board made the decision of the establishment of an offence and we did not impose any fine in February 2001.

2.

2. (a) HE published an advertisement in the main newspapers in 1999. The advertisement listed the bicycles distributed by HE together with retail prices. The advertisement also included the list of retail outlets from which the products could have been obtained. The list included besides HE-s retail outlets also the ones of the dealers.

2 (b) When cartel case ceased the prices of bicycles distributed by HE the prices hadn't changed remarkably. The market is open, there are many competitors in the bicycles market and the price competition exist continually.

B. General Information on Sanctions

According to the Competition Act forced on 1 October 1998, repealed on 1 October 2001 the sanctions were as follows.

Proceedings of a matter will be terminated by a decision of the Director General of the Competition Board or his or her deputy on non-establishment of an offence or establishment of an offence.

A decision establishment of an offence may contain a mandatory precept for the undertaking or a proposal to a government agency or local government agency. If an undertaking fails, without good reason, to submit information or materials by the deadline demanded in a written demand of the Competition Board, prevents the inspection of the location of its activities, or, without good reason, refuses inspection prescribed by a directive of the Director General of the Competition Board or his or her deputy or fails to appear, without good reason, at an oral discussion, the Director General of the Competition Board or his or her deputy may by a decision impose a fine of up to 2 000 kroons per calendar day. If an undertaking fails to fulfil or unsatisfactorily fulfils a mandatory precept set out in a decision of the Director General of the Competition Board or his or her deputy by the date specified in the decision, the Director General of the Competition Board or his or her deputy may by a decision impose a fine of up to 5 000 kroons per calendar day, subject to mandatory collection as of the day following the date of imposition of the fine until the day the undertaking fulfils the precept set out in the decision and notifies the Competition Board thereof in writing. An undertaking has the right to file an appeal with a court against a decision of the Director General of the Competition Board or his or her deputy on the imposition of a fine pursuant to the procedure provided for in the Code of Administrative Offences within one month from the date such decision is received.

The Director General, his or her deputy, department heads, deputy department heads and chief specialists of the Competition Board have the right to prepare reports of administrative offences of Competition Act. Administrative judges have the right to impose punishments for the administrative offences. For submission of incorrect, incomplete or misleading information or for failure to give notice of a merger or to give notice of a merger on time to the Competition Board, a fine of up to 1 per cent of the net turnover of the financial year of the offender preceding the year that the decision to impose a fine is made shall be imposed, but not less than 10 000 kroons. For concerted practices, enforcement of a prohibited agreement, failure to apply for an exemption for an agreement which requires exemption within six months from entry into such agreement, failure to fulfil a condition or obligation established in a decision of exemption, for abuse of a dominant position of an undertaking in the market or for planning such acts, a fine of up to 5 per cent of the net turnover of the financial year of the offender preceding the year that the decision to impose a fine is made shall be imposed, but not less than 20 000 kroons. For failure to fulfil the obligations imposed on an undertaking with special or exclusive rights or a natural monopoly, a fine of up to 1 per cent of the net turnover of the financial year of the offender preceding the

year that the decision to impose a fine is made shall be imposed, but not less than 10 000 kroons. According to the Competition Act proprietary or other damage caused by actions prohibited by Competition Act shall be compensated for by way of civil procedure.

According to the Competition Act entered into force 1 October 2001 the sanctions are as follows.

The Director General of the Competition Board or his or her deputy has the right to issue a precept to a natural or legal person if such person fails to submit information or materials within the term specified in a written request of the Competition Board; interferes with an inspection of the seat or place of business of the undertaking; fails to appear at an oral hearing or preparation of an administrative offence report or when requested to provide explanations; puts into effect a concentration which is subject to control or a decision prohibiting the concentration has been made or the permission for the concentration has been revoked by the Director General of the Competition Board or his or her deputy. A precept imposes an obligation to perform a required act or to refrain from a prohibited act. In the case of a failure to comply with a precept, the Director General of the Competition Board or his or her deputy may impose a penalty payment of up to 50 000 kroons on natural persons and a penalty payment of up to 100 000 kroons on legal persons. Preparing an administrative offence report shall terminate proceedings concerning a case or by a decision of the Director General of the Competition Board or his or her deputy. Proceedings in matters concerning administrative offences by legal persons provided for in the Competition Act shall be conducted pursuant to the procedure provided by Competition Act and, in the cases not directly regulated by Competition Act, pursuant to the procedure provided for in the Code of Administrative Offences.

The Director General of the Competition Board and his or her deputy and the officials of the Competition Board authorised by the Director General or his or her deputy have the right to prepare reports concerning the administrative offences. A report shall be submitted for hearing by a court within ten calendar days after preparation of the report. A fine in the amount of up to one per cent of the turnover of the offender during the financial year preceding the decision on the imposition of the fine shall be imposed for submission of incorrect, incomplete or misleading information to the Competition Board. A fine in the amount of up to 10 per cent of the turnover of the offender during the financial year preceding the decision on the imposition of the fine shall be imposed for abuse of a dominant position; prohibition on an agreement, practice or decision restricting competition and for entry into an agreement, engagement in a practice or making of a decision requiring an exemption without obtaining such exemption and for violation of the conditions of an exemption; for failure to give notice of a concentration within the specified term and for violation of a prohibition on concentration or the conditions of a permission to concentrate; for failure to draw a clear distinction between primary and secondary activities in the accounting of a legal person with special or exclusive rights or in control of essential facilities.

Proprietary or other damage caused by acts prohibited by this Act shall be subject to compensation by way of civil procedure. The Competition Act amended also Criminal Code. A member of the management board, a body substituting for the management board or of the supervisory board of a legal person, who establishes unfair trading conditions, limits production, services, market, technical development or investments to the prejudice of consumers, or engages in other activities causing a direct or indirect abuse of a dominant position, who violates a prohibition on an agreement, decision or practice restricting competition, or enters into an agreement, makes a decision or engages in practices requiring an exemption without obtaining such exemption, or violates the conditions of the exemption, who fails to notify of a concentration within the specified term or violates a prohibition on concentration or the conditions of a permission to concentrate, who engages in activities resulting in a failure to draw a clear distinction between primary and secondary activities in the accounting of a legal person with special or exclusive rights or in control of essential facilities shall be punished by a fine or up to 3 years' imprisonment.

5.

Public Procurement Act

Civil, disciplinary, administrative or criminal liability is applied for violation of Public Procurement Act. Administrative liability applied to a legal person shall not preclude application of administrative or criminal liability to a relevant natural person. If the Office receives information concerning an offence relating to public procurement or it discovers such offence in the course of supervisory activities relating to public procurement and the offence cannot be regarded as an administrative offence provided of Public Procurement Act, the Office should notify a police authority or a prosecutor of the facts known to the Office. The Office has the right to make proposals concerning disciplinary proceedings to be brought against a person or persons who have violated Public Procurement Act. The Director General of the Office, the deputy Director General and an official of the same agency authorised by the Director General have the right to issue administrative offence reports to legal persons concerning administrative offences. County or city court judges hear matters concerning administrative offences by legal persons. The judge could impose fine of 5000 to 500 000 kroons depending of the violation of public procurement procedure.

Same examples in Criminal Code about violation of Taxation Act and Acts concerning tax:

Failure to submit information, an income tax return or documents provided by law to a tax authority or failure to submit these on time, if such acts are intentionally committed, or if an administrative punishment has been imposed on the offender for a similar offence, is punishable by a fine or detention or up to one year imprisonment.

Submission of false information or falsified documents to a tax authority, or presentation of false information in an income tax return, if such acts are intentionally committed, or if an administrative punishment has been imposed on the offender for a similar offence, is punishable by a fine or detention or up to three years' imprisonment.

Failure to pay an amount of tax due pursuant to an Act concerning a tax by a due date or payment of an amount of tax which is smaller than prescribed, if such acts are intentionally committed, or if an administrative punishment has been imposed on the offender for a similar offence, is punishable by a fine or detention or up to three years' imprisonment.

Failure to transfer an amount of tax due to be withheld pursuant to an Act concerning a tax by a due date or transfer of an amount of tax which is smaller than prescribed, if such acts are intentionally committed, or if an administrative punishment has been imposed on the offender for a similar offence, is punishable by a fine or detention or up to three years' imprisonment.

Failure to perform a duty imposed on a legal person or agency by the Taxation Act or an Act concerning a tax, if such act is intentionally committed by a competent official who is required to perform the corresponding duty, or if an administrative punishment has been imposed on the offender for a similar offence, is punishable by a fine or detention or up to three years' imprisonment.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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I. – COMPETITION LAW AND POLICY IN INDONESIA

I. Indonesia's Competition Law: Law Number 5 of 1999 Concerning the Prohibition Monopolistic Practices and Unfair Business Competition

A. Background on Law Number 5

a) Passed by the House of Representatives on 5 March 1999 with an effective date of 5 March 2000, in order to provide time for the socialization of the new law.

b) Businesses were given an additional six-month grace period, until 5 September 2000, to come within compliance of the law.

c) Law Number 5 was adopted in part to address public concerns regarding monopolistic practices and closely related concerns about corruption, collusion, and nepotism (known in Indonesia by the acronym "KKN")

d) In a practice rarely invoked by the House of Representatives, the House exercised its right to propose the draft law -- rather than relying on the government to do so -- and this draft formed the basis of Law Number 5.

e) Prior to the passage of Law Number 5, legal provisions touching on competition could be found scattered throughout numerous other laws, including both the criminal and civil codes.

B. The Purposes of Law Number 5 (as set forth in Article 3)

a) To safeguard the interests of the public and to improve national economic efficiency in order to improve the people's welfare.

b) To ensure the certainty of equal business opportunities for large, medium, and small-scale businesses.

c) To prevent monopolistic practices and unfair business competition.

C. The Organization of Law Number 5

a) Contains 11 chapters and 53 articles, with the major substantive law sections consisting of:

a. Prohibited agreements
   (1) Oligopoly (Article 4)
   (2) Price fixing (Article 5)
   (3) Price discrimination (Article 6)
   (4) Predatory pricing (by agreement with competitors) (Article 7)
   (5) Resale price maintenance (Article 8)

(6) Market division (Article 9)
(7) Group boycotts (Article 10)
(8) Cartels (Article 11)
(9) Trusts (Article 12)
(10) Oligopsony (Article 13)
(11) Vertical integration (Article 14)
(12) Exclusive dealing concerning re-supply (Article 15 (1))
(13) Tying (Article 15 (2))
(14) Reciprocal dealing (Article 15 (3) a.)
(15) Exclusive dealing (Article 15 (3) b.)
(16) Agreements with foreign parties that may result in monopolistic practices or unfair business competition (Article 16)

b. Prohibited activities
(1) Monopoly (Article 17)
(2) Monopsony (Article 18)
(3) Market control (Article 19)
(4) Predatory pricing (unilaterally) (Article 20)
(5) Determining production and other costs (Article 21)
(6) Conspiracies to rig bids (Article 22)
(7) Obtaining competitors' business secrets (Article 23)
(8) Impeding production and marketing of competitors' products (Article 24)

c. Abuse of dominant position
(1) Abuse of dominant position (Article 25)
(2) Interlocking directorates (Article 26)
(3) Cross- share holding (Article 27)
(4) Mergers & acquisitions that may result in monopolistic practices or unfair business competition (Article 28) and giving the KPPU notice of proposed mergers (Article 29)

d. There currently is little guidance regarding merger review and notification other than:
(1) The prohibition of mergers that result in monopolistic practices and unfair business competition (Article 28).
(2) The requirement that the government develop further regulations governing merger review and notification. Such regulations have yet to be issued (Article 29). As Law Number 5 currently reads, Indonesian law will not require prior notification of mergers, only notification within thirty days of the merger.

e. Exemptions (Article 50) -- provides exemptions for certain activities involving, among others, agreements intended to implement applicable laws and regulations, intellectual property, standard setting, joint ventures for research and development, international agreements ratified by the government, export agreements, activities of small-scale enterprises, and activities of cooperatives aimed at serving their members.

f. State action exception -- the law also includes what effectively is a "state action" exception (Article 51), permitting monopoly if it is the result of a law (passed by the DPR), and if its activities are carried out by a state-owned enterprise or institution formed or appointed by the government.

2. Creates the Commission for the Supervision of Business Competition -- the "KPPU" -- responsible for enforcing Law Number 5 (Articles 30-37).
3. Establishes the procedures for reporting possible violations of Law Number 5 to the KPPU and how the KPPU should handle possible violations of the law (Articles 38-46).
4. Sets forth the sanctions for violations of Law Number 5 (Articles 47-49).

D. The law's primary focus is on the prohibition of business practices that may result in "monopolistic practices" or the "unfair business competition," although Law Number 5 also contains some presumptions of illegality based on market shares.

1. There are market share presumptions in the provisions dealing with:
   a. Oligopoly (Article 4) -- collectively controlling 75% of a market.
   b. Oligopsony (Article 13) -- collectively controlling 75% of a market.
   c. Monopoly (Article 17) -- controlling 50% of a market.
   d. Monopsony (Article 18) -- controlling 50% of a market.
   e. Dominant position (Article 25) -- one firm controlling 50% of a market or several firms controlling 75% of a market.

2. Additionally, market share defines the violation in the case of cross-share holding (Article 27), where one firm owns a majority of shares in companies controlling 50% of a market, or a group of firms owns a majority of shares in companies controlling 75% of a market.

E. There is no private right of action under Law Number 5.

II. The Commission for the Supervision of Business Competition ("KPPU")

A. Background on the KPPU

1. Established in accordance with Articles 30-37 of Law Number 5 and Presidential Decree Number 75 of 1999, and it began operations through the appointment of Commissioners in June 2000.
2. Indonesia's first independent regulatory commission -- not part of the executive, legislative, or judicial branches of Government.
3. Major functions:
   a. Law enforcement -- investigating, interpreting, and enforcing Law Number 5, which prohibits monopolistic practices and unfair business competition.
   b. Competition advocacy -- providing advice on government policy related to monopolistic practices and unfair business competition.
   c. Written guidelines and policy statements -- assisting business and the public understand and comply with the law.
4. Subject to oversight by:
   a. The President -- through reporting requirements and the appointment (and possible dismissal for cause) of the Commissioners, upon approval of the House of Representatives.
   b. House of Representatives ("DPR") -- through reporting requirements and the budget process.
   c. The judiciary -- through appellate review and possible enforcement of the KPPU's decisions.

d. The public -- through decisions of the KPPU, which are read in public session.

B. The Organization of the KPPU

1. The Commissioners
   a. Eleven commissioners, appointed by the President, with confirmation from the House of Representatives.
   b. Must be experienced in business or have expertise in law or economics, and must not have ties to any business entity.
   c. Serve five-year terms and may be reappointed for one additional five-year term.
   d. Each Commissioners has equal authority and the Commission acts through majority vote.
   e. The Chairman and Vice Chairman are selected by the Commissioners and serve one-year terms.

2. The Secretariat
   a. Consists of four directorates:
      1. Directorate for Investigation and Law Enforcement -- responsible for investigating alleged violations of Law Number 5 and litigating cases before the courts.
      2. Directorate for Communication -- responsible for disseminating information to business, the public, and the press.
      3. Directorate for Research and Training -- responsible for training the professional staff and providing research in support of cases under investigation and the competition advocacy program.
      4. Directorate for General Affairs -- responsible for administration, finance, and personnel.
   b. The professional staff consists primarily of lawyers and economists.

C. Remedial Powers of the KPPU

1. Civil Remedies (Article 47):
   a. Declare unlawful agreements null and void.
   b. Require restructuring of firms guilty of illegal vertical integration.
   c. Issue cease and desist orders to stop activities causing monopolistic practices or unfair business competition or the abuse of dominant position.
   d. Cancel mergers or consolidations in violation of the law.
   e. Order compensation for damages by violators to injured parties.
   f. Impose civil fines up to Rupiah 25 billion (approximately $2.5 million) for violations of the law.
2. The KPPU may seek criminal penalties, for certain violations enumerated in Article 48, through submission of the case to police investigators, who may refer the matter to the public prosecutor and, ultimately, the courts.
   a. Criminal fines up to Rupiah 100 billion (approximately $10 million).
   b. Prison sentences of up to six months.

D. Regulations Governing the KPPU's Internal Operations -- Law Number 5 gives the KPPU the power to promulgate regulations governing its internal operations. To date, the KPPU has issued the following regulatory "decisions":

1. Decision Number 1 -- concerning the election procedures for the chairman and vice chairman of the KPPU.
2. Decision Number 4 -- concerning the organizational structure, duties, and function of the KPPU's secretariat. (Decision Number 4 supersedes Decisions 2 & 3, which also dealt with the organization of the secretariat.)
3. Decision Number 5 -- concerning the procedures for submitting complaints and handling suspected violations of Law Number 5. (This is outlined in Section III below.)
4. Decision Number 6 -- concerning the code of ethics of the KPPU.
5. Decision Number 7 -- concerning the "working group" of outside experts to assist the KPPU on an ad hoc basis to investigate alleged violations of Law Number 5.
6. Decision Number 8 -- concerning the procedures for holding "consultation meetings" (public hearings) of the KPPU to obtain information about possible violations of Law Number 5.

III. The KPPU's Procedures for Case Initiation and Handling

A. Cases may be initiated based on a report from a party complaining about a possible violation of Law Number 5 or upon the initiative of the KPPU.

B. Submission of the Report (Complaint)

1. Determining whether the report is complete or incomplete

   a. To be considered complete, a report must:
      (1) Be in writing, in Indonesian, and signed by the "reporting party" (complainant), including a name and address.
      (2) Provide details on the violation allegedly committed by the "reported party" (target).
      (3) Include any supporting documentation or evidence.

   b. If a report is found incomplete:
      (1) The reporting party is notified of any deficiencies and is given ten days to correct the report. If not corrected, the report will be deemed incomplete.
      (2) If no notice of deficiency is given within ten days of receipt, the report is considered complete.

2. Complete reports are summarized by the Secretariat, recorded in the case register, and are then submitted to the Commissioners.
3. Notification is given to the reporting party of the commencement of the preliminary examination.
4. The identity of the reporting party and any business secrets are kept confidential.

C. Preliminary Examination

1. 30 business days to complete.
2. The purpose of the preliminary examination is to determine whether further investigation is warranted.
3. The investigation is conducted on a voluntary basis, with requests for cooperation from the reporting party, the reported party, and other third-party witnesses. Compulsory process may be used if necessary.

4. The reporting party and the reported party may be called before the Commission for questioning.
5. Commission as a whole decides whether further investigation is warranted.

D. Follow-Up Examination
1. 60 business days to complete, with possible extension up to 30 business days.
2. The purpose of follow-up investigation is to determine whether the law has been violated.
3. A "Council of Commissioners," which is established by the Commission to conduct follow-up investigations and must consist of at least three Commissioners, determines how to structure the investigation, whether to close it, and what, if any, sanctions to impose.
4. The investigation is conducted on a voluntary basis, with requests for cooperation from the reporting party, the reported party, and other third-party witnesses. Compulsory process may be used if necessary.
5. May include the involvement of police investigators if necessary.

E. The Commission's Decision
1. Must be issued within 30 business days of close of the follow-up examination.
2. The Commission Council determines whether the law has been violated, and its decision is issued in writing and must include the Council's reasoning.
3. The decision is made public by a reading in an open session of the entire Commission.

F. Implementation of the Commission's Decision
1. The reported party is notified of the decision.
2. The reported party is required to abide by the Commission's decision within 30 days of issuance, unless it makes objections within 14 days of notification.
3. The reported party may appeal the KPPU's decision to the District Court. The District Court must hear the appeal within 14 days after filing, and it must render a decision within 30 days after initiating the case.
4. Appeals from the District Court are taken to Supreme Court, which must hear the appeal within 14 days after filing and must render a decision within 30 days after initiating the case.
5. If the reported party fails to comply with the Commission's decision the matter may be submitted either:

    a. To the courts for an enforcement order, where civil penalties are sought.
    b. To the police investigator, who then may refer it to the prosecutor and, ultimately the courts, for further action where criminal allegations are involved.

G. The Working Group
1. The KPPU may be assisted in its investigations on an ad hoc basis by a "working group."
2. A working group consist of individuals from outside the KPPU who are experienced or are expert in fields deemed necessary to assist the KPPU investigate a given case.

IV. The KPPU's Law Enforcement and Competition Advocacy Actions to Date

A. The *Caltex* Case

1. On April 20, 2001, the KPPU found Caltex Pacific Indonesia, an oil company, and three pipe processors, Citra Tubindo, Purna Bina Nusa, and Patraindo Nusa Pertiwi, guilty of bid-rigging in violation of Article 22 of Law Number 5, resulting from a tender by Caltex to supply it with pipe. Citra Tubindo, Purna Bina Nusa, and Patraindo Nusa Pertiwi were found to have exchanged their bid prices with each other at a meeting the evening before the bids were opened. Caltex, in turn, was held responsible for failing to "exercise[ ] adequate prudence in ensuring fair business competition," because in setting up the tender process it "should have expected [that] collusion would occur."
2. As a consequence of the violation, the KPPU required that the pipe-supply contract entered between Caltex and Citra Tubindo, the lowest bidder, be terminated, and that the entire tender process be re-done.
3. Caltex has accepted the KPPU's verdict and has not sought an appeal to the district court.

B. The *Indomaret* Case

1. On July 4, 2001, the KPPU found Indomarco Prismatama, the owner of the Indomaret convenience-store chain, which has about 470 stores to be acting "economically undemocratic" in violation Articles 2 and 3 of Law Number 5.
2. The KPPU had received complaints against Indomaret from many small store operators complaining of, among other things, predatory pricing, illegal vertical integration, exclusive dealing, abuse of dominant position, and price discrimination. The investigation itself, however, was opened on the KPPU's initiative after a period of "monitoring" Indomarco Prismatama 's behavior.
3. As a result of finding the violation, the KPPU ordered that Indomarco Prismatama be forbidden from expanding its Indomaret stores in "traditional markets;" that is, areas with open-air food stalls selling all manner of groceries, fruits, and vegetables. The KPPU also recommended to Indomarco Prismatama that to the extent it expands the number of its Indomaret stores, it should do so more through franchises than through Indomarco Prismatama -owned stores.
4. The KPPU also recommended to the government that it should improve its policies and regulations regarding retailing (e.g., zoning, location permits, opening hours), and that the government work to help empower small and medium enterprises to compete more effectively.
5. Since the decision was announced, Indomarco Prismatama has stated publicly that it will abide by the decision and that it will not seek to challenge the decision in court.

C. The KPPU's Industry Monitoring Activities

1. One of the KPPU's function under Law Number 5 is to monitor the compliance and adherence of businesses in Indonesia to the law.
2. As part of the monitoring process, the KPPU has identified a number industries where a single firm appears to control more than 50 percent of the market. Some of the industries that have been subject to KPPU monitoring are:
   a. Cement
   b. Cigarettes
   c. Cooking oil

d. Detergent
e. Flat Glass
f. Instant coffee
g. Instant noodles
h. Lubricating oil
i. Mineral water
j. Paper and pulp
k. Wheat flour

3. As part of the monitoring process, the KPPU has held public hearings where the apparent dominant firm, other industry participants, and interested parties have been invited to appear, give testimony, and answer questions. To date, such public hearings have taken place in the following industries:
   a. Paper and pulp
   b. Wheat flour
   c. Day-old chickens
   d. Taxi Cab
   e. Airline Association
4. Additionally, the apparent dominant firms, as well as other interested parties, have been invited to appear before the KPPU in closed session to answer follow-up questions and to give additional testimony.
5. To date, besides those last two cases, no further actions have been taken by the KPPU as a result of these monitoring activities.

D. The KPPU's Competition Advocacy Activities

1. Taxi Cab Tariffs -- the KPPU has sent a letter to the Ministry of Transportation advising it that a government plan to permit a private association of taxi-cab companies to set taxi-cab tariffs would likely result in higher taxi prices for consumers and could harm competition. Consequently, the KPPU has advised the Ministry of Transportation not to grant the taxi cab association these powers.
2. Airline Price Benchmarks -- the KPPU has been reviewing a plan by the Ministry of Transportation to permit a private association of airlines to collectively set certain pricing benchmarks from which airfares in Indonesia may be set. The KPPU is concerned that such a policy could have the effect of raising prices to consumers and harming competition, and it has already issued a letter to this effect to the Ministry of Transportation.
3. Kerosene Pricing -- On April 18, 2001, the KPPU sent letters to the Ministry of Energy and Mineral Resources, the Coordinating Ministry for Economic Affairs, and Pertamina (the state oil company) concerning price discrimination on kerosene prices. According to Presidential Decree No. 45 of 2001, kerosene prices in the country are set at different levels for three categories of end user: foreign industrial companies, domestic industrial companies, and general consumers. The KPPU pointed out to the Ministries and to Pertamina that such an action may violate Article 6 of Law Number 5's prohibition against price discrimination, and that such decrees could become a bad precedent for future government action, given their potential to harm competition.

V. The Challenges Ahead for the KPPU and Law Number 5

The KPPU faces many challenges implementing Law Number 5 in the coming months and years. These challenges broadly fall into two categories:

A. Challenges Involving the Interpretation and Enforcement of Law Number 5
   1. What are Law Number 5's purposes and goals in practice?
   2. Which goals will take precedence in specific cases, should the goals conflict?
   3. How broadly or narrowly will the exemptions to Law Number 5's scope, as set forth in Articles 50 and 51, be drawn?
   4. What meaning will the KPPU and the courts give to the terms "monopolistic practices" and "unfair business competition" as the law develops?
   5. What areas of law enforcement will become the KPPU's priorities?
   6. Are Indonesia's courts prepared to deal with antitrust cases when they arise, and what will the courts actually do when presented with such cases? How and what rules of evidence and procedure will apply? How will the courts apportion the burdens of proof? How much deference will the courts give to the KPPU's initial findings of fact and conclusions of law?
   7. Will the law enjoy the support of the people, businesses, the government, and the legislature?

B. Challenges Involving the Development of the KPPU as an Institution
   1. Will the legislature and government provide the KPPU with a budget and resources sufficient to do its job?
   2. Can the KPPU attract and retain a professional, well-trained, and highly motivated staff?
   3. How will the KPPU allocate its limited resources between its law enforcement, competition advocacy, and public and business education roles?
   4. Is the KPPU as an institution likely to enjoy the support of the people, businesses, the government, and the legislature?
   5. Will the KPPU be able to demonstrate, over time, the value of its mission and work in terms of promoting competition, protecting consumers, and enhancing the economic well being of the Indonesian people?

II. – DESCRIPTION OF CASES

The Republic of Indonesia's Commission for the Supervision of Business Competition ("KPPU") to date has brought only one matter challenging hard-core cartel behavior -- the *Caltex* case. In this case, the KPPU found Caltex, an oil company, and three pipe processors, Citra, Purna, and Patraindo, guilty of bid-rigging in violation of Indonesia's Law Number 5 of 1999, resulting from a tender by Caltex to supply it with pipe and pipe processing services. Citra, Purna, and Patraindo were found to have exchanged their prices with each other at a meeting the evening before the bids were opened. Caltex, in turn, was held responsible for failing to "exercise[ ] adequate prudence in ensuring fair business competition," because in setting up the tender process it "should have expected from the beginning that . . . collusion would occur."

PPU CALTEX DECION (Number: 01/KPPU-L/2000)

FOR THE SAKE OF GOD THE ALMIGHTY

The Business Competition Supervisory Commission hereinafter referred to as the Commission examining alleged violations of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices allegedly committed by:

- PT. CALTEX PACIFIC INDONESIA, having its office address at Sarana Jaya Building, Jalan Budi Kemuliaan I No.1, Jakarta 10340, hereinafter referred to as the Reported Party;
- Has made the following decision:
- The Commission Council;
- After having read the Report and documents in this case;
- After having heard the statement of the parties concerned;
- After having investigated the Reported Party's activities;
- After having read the Minutes of Examination;

IN VIEW OF THE CASE:

1. Considering whereas a business enactor hereinafter referred to as Report Party I in his letter dated April 5, 2000 received by the Commission on June 30, 2000 stated the following:

   a) Whereas in the period prior to the year 2000, with the aim of meeting its piping requirements for one year, the Reported Party had usually announced a tender open to vendors based on the TDR (Contractor's Registration Certificate) owned by them respectively. Such tender was for 1 x 1 year, namely usually referred to as Blanket Purchase Order (BPO) and such BPO itself consisted of several items (max. 8 items) divided into 2 (two) categories, namely:

      - Low grade (75% of the total requirement),
      - High grade (25% of the total requirement);

   b) Whereas to date (in approximately the past 5 years) Reporting Party I as the Reported Party's Contractor, specifically for low grade requirements, has almost always been awarded the said tender, even though he only had facilities for low grade, compared to his competitors who had more complete facilities (low grade and high grade), it was still competitive;

   c) Whereas the implementation of and competition in the tender mentioned in paragraph b hereinabove was considered rather fair by Reporting Party I because it was in compliance with the prevailing provisions and there was no requirement to offer all items requested by the Reported Party, but in accordance with the capabilities of the respective bidders, whatever they considered

they were capable of offering. This was done by the Reported Party in recognition of the fact that the capabilities and facilities possessed by the respective bidders varied or were not the same;

d) Whereas there were no limitations in respect of the pipes (country of origin), the most important thing being that these met international standards namely the American Petroleum Institute (API);

e) Whereas in the order realisation process Reporting Party I had never encountered any problems, either from the aspect of pricing, raw material origin or the process plant of Reporting Party I (on Batam Island), until the dispatch of the goods to the Reported Party's place/warehouse. No delays have ever occurred, delivery has been even faster than the determined schedule;

f) Whereas for the period of the year 2000, Reporting Party I considered the implementation of the Reported Party's tender no longer fair with tendencies of fabrication, increasingly narrowing down the role of Reporting Party I and it could be deemed it had no more opportunities for the following reasons:

1. There were only 4 (four) bidders, namely:

   – PT. Purna Bina Nusa that did not have upsetting and heat treatment facilities, so that it could only offer low grade;

   – PT. Patraindo Nusa Pertiwi was equal to PT. Purna Bina Nusa,

   – PT. Citra Tubindo Tbk. had upsetting and heat treatment facilities so that it was able to offer low grade and high grade;

   – PT. Seamless Pipe Indonesia Jaya was equal to PT. Citra Tubindo Tbk.;

2. The tender was awarded to one bidder only, namely the bidder offering all items (low grade and high grade);

3. All bidders were required to offer all items (low grade and high grade);

4. Bidders offering in accordance with their capability (low grade), even though their price was quite good and low but their offer was not complete with high grade because they did not receive support in the form of price and letter of support from the bidder possessing high grade, were going to be disqualified;

5. Those not possessing high grade facilities could request price and support from bidders possessing high grade facilities (whereas those possessing high grade facilities were the competitors of those not possessing high grade facilities, so that it would not make sense to have them compete with them);

6. Raw material supply sources were also limited and directed to particular sources;

Based on the above statements, Reporting Party I deemed as follows:

1. The Reported Party's planned tender allegedly violated the provisions of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Practices,

2. The Reported Party's planned tender was not usual and was not fair for other participants/bidders,

3. The Reported Party's planned tender did not meet the criteria of principles of justice and equality. Reporting Party I deemed that there were unusual provisions and requirements in the plan compared to those applied previously tending to be oriented towards a particular supplier;

2. Considering that another business enactor hereinafter referred to as Reporting Party II in his letter dated September 13, 2000 received by the Commission on September 14, 2000, stated as follows:

   a. Whereas in the Reported Party's tender No.Q-034210-0000-0000-00-52 only manufacturers were invited and it showed a tendency to monopoly, in addition to that referred to as manufacturers were only thread makers (*pengulir*) and most strangely the awardee had been determined prior to the tender. The tender had not been announced in the mass media as stipulated in Pertamina's Decision Number 027/C0000/2000-SO dated April 15, 2000 and such tenders had been participated in by other oil contractor companies such as Conoco, Pertamina DEP Prabumulih, Maxus and others, and this was supported by BPPKA Pertamina;

   b. Whereas therefor the Reported Party held a meeting on August 3, 1999 in the Reported Party's Conference Room to discuss Business Partnering Casing & Tubing. Invited to and attended the meeting were the following:

      – On the Reported Party's part Tatang Heramawan, Pandji Ariaz, Teuku A.S., Sic/Dea,

      – On the pipe processor's part PT. Citra Tubindo Tbk., PT. Hymindo Petromas Utama/Citra Tubindo Group, PT. Seamless Pipe Indonesia Jaya/Bakrie Group, PT. Purna Bina Nusa, PT. Patrindo Nusa Pertiwi, PT. Pipa Mas Putih,

      – On Pertamina's part Willem L.B. Siahaya – Head of Logistic Bureau of BPPKA,

      – On Migas' part Moch.Poernomo Singgih,

      – On the part of Development Control, Hananto;

   c. Whereas the system and requirements proposed by the Reported Party in the tender concerned were as follows:

      – One-package system even though there were 8 (eight) items consisting of low grade and high grade,

      – Participants required to offer all items, if not, they would be disqualified;

      – Only be 1 (one) vendor would be appointed as awardee for 3 (three) years;

      – Bidders (vendors) not possessing heat treatment facilities had to ask the same from bidders who had heat treatment facilities;

      – Heat treatment had to originate from in-country;

   d. Whereas the meeting specified in sub-article b here in above was held several times in Batam, Anyer, Hotel Millenium Jakarta and at the Reported Party's Office in Jakarta attended by the same persons; Based on the above, Reporting Party II is requesting the Commission to

straighten out the tender requirements so that other contractors, too, can benefit from the same, not only a few of them;

3. Considering whereas in view of the written report of Reporting Party I and Reporting Party II mentioned above, on September 13, 2000 the Commission determined to conduct a Preliminary Examination, and for that purpose the Commission appointed an Examination Team consisting of Ir. H. Mohammad Iqbal as the Chairperson of the Team, Soy Martua Pardede, SE as Member, and Ir. H. Tadjuddin Noer Said as Member;

4. Considering whereas after having conducted a Preliminary Examination from September 13, 2000 through October 24, 2000 the Examination Team found allegations of violation that need to be further developed from the parties whose statements need to be heard, therefore the Examination Team recommended that the Commission conduct Follow-up Examination;

5. Considering whereas in view of such recommendation of the Examination Team, the Commission has decided to accept and conduct Follow-up Examination, and for such purpose it established the Commission Council consisting of Ir. H. Mohammad Iqbal as the Chairperson of the Commission Council, Soy Martua Pardede, SH as Member of the Commission Council and Ir. H. Tadjuddin Noer Said as Member of the Commission Council;

6. Considering whereas the Commission Council conducted Follow-up Examination from October 26, 2000 through January 23, 2001 and it was extended up to and including March 7, 2001;

7. Considering whereas in the Follow-up Examination the Commission Council reviewed 30 (thirty) documents obtained and requested from Reporting Party I as indicated in Attachment I to this Decision;

8. Considering whereas in the Follow-up Examination the Commission Council reviewed 11 (eleven) documents obtained from Reporting Party II as indicated in Attachment II to this Decision;

9. Considering whereas the Commission Council heard the statements of 22 (twenty-two) Witnesses, respectively as follows:

   a) Nugroho I. Purbowinoto, in this matter acting for and on his own behalf in his capacity as the President Director of PT. Seamless Pipe Indonesia Jaya;

   b) Drs. Frankie Setiadi, in this matter acting for and on behalf of the President Director of PT. Citra Tubindo, Tbk, furthermore verbally in the Examination Room and before the Commission Council Drs. Frankie Setiadi stated that Herman Hermanto and Frenandez da Silva who appeared jointly could make a statement for and on behalf of PT. Citra Tubindo Tbk.;

   c) Yusuf Ginting and Hendra Kosasih, in this matter acting for and on behalf of the President Director of PT. Pipa Mas Putih;

   d) Djurianto and Eryono, in this matter acting for and on behalf of the President Director of PT. Patraindo Nusa Pertiwi;

   e) Moch. Poernomo Singgih and Drs. Willem L.B. Siahaya, in this matter acting for and on his own behalf in his capacity as member of the Joint Committee of the Government-CPI;

f) Ir. Lolita and Yosephne yap, in this matter respectively acting for and on their own behalf in their capacities as the Managing Director and the General Manager of PT. Penta Adi Samudera respectively;

g) Sonny W/ Trisulo, in this matter acting for and on his own behalf in his capacity as the President Director of PT. Multi Guna Laksindo;

h) Drs. Purnama, Msi, Aji Prayudi, SH, MM and Sudarso, in this matter acting for and on behalf of the President Director of Pertamina;

i) Ir. Sarwi Notoatmodjo and Ir. Indradjit Kartowijono, in this matter acting for and on their own behalf respectively in their capacities as the Director of Oil and Gas Supporting Association and the President Director of PT. Energitama Bumi Nusa respectively;

j) On the part of the Government, namely Dr. Ir. Rachmat Sudibyo, in this matter acting for and on his own behalf in his capacity as the Director General for Oil and Gas of the Department of Energy and Mineral Resources, Subiyanto and Edi Purnomo, in their respective capacities as staff members of the Directorate General of Oil and Gas, Department of Energy and Mineral Resources; and

k) Witnesses whose identity has been kept a secret by the Commission Council;

10. Considering whereas the complete identity of the Witnesses and other parties examined and the complete statements of such parties have been recorded in the Minutes of the Examination;

11. Considering whereas in the course of this Follow-up Examination the Commission Council reviewed 2 (two) documents from Witness Djurianto and Eryono as indicated in Attachment III to this Decision;

12. Considering whereas in this Follow-up Examination, the Commission Council reviewed 3 (three) documents from Witness Moch. Poernomo Singgih and 4 (four) documents from Witness Willem L.B. Siahaya, as indicated in Attachment IV to this Decision respectively;

13. Considering whereas in the course of this Follow-up Examination the Commission Council reviewed 4 (four) documents from Witness Ir. Lolita and Yosephine Yap, as indicated in Attachment V to this Decision;

14. Considering whereas in this Follow-up Examination the Commission Council reviewed 7 (seven) documents from Witness Sonny W. Trisulo as indicated in Attachment VI to this Decision;

15. Considering whereas in this Follow-up Examination the Commission Council reviewed 4 (four) documents from Witnesses Drs. Purnama, Msi, Aji Prayudi, SH, MM and Sudarso, as indicated in Attachment VII to this Decision;

16. Considering whereas in this Follow-up Examination the Commission Council reviewed 3 (three) documents form Witnesses Ir. Sarwi Notoatmodjo and Ir. Indradjit Kartowijono, as indicated in Attachment VIII to this Decision;

17. Considering whereas in this Follow-up Examination the Commission Council reviewed 1 (one) document from the Government in this matter from the Directorate General of Oil and Gas, Department of Energy and Mineral Resources, as indicated in Attachment IX to this Decision;

18. Considering whereas the Commission Council heard the statement of the Reported Party represented by A.H. Batubara, the Vice President for General Affairs, Pandji A. Arias, Senior Coordinator Procurement Business Relations, Genades Panjaitan, Manager Corporate Affairs and A.B.M. Simanjuntak, Manager Strategic Procurement, in this matter acting for and on behalf of the President Director of PT. Caltex Pacific Indonesian by virtue of a special Power of Attorney from the President Director of PT. Caltex Pacific Indonesia Number 2574/JKT/2000 dated December 19, 2000;

19. Considering whereas the Commission Council reviewed 79 (seventy-nine) documents of the Reported Party as indicated in Attachment X to this Decision;

20. Considering whereas the Commission Council finally has sufficient data for making a Decision;

CONCERNING THE LEGAL ASPECTS:

1. Considering whereas according to Reporting Party I in his written statement and in the statement given in the hearing before the Commission Council as well as in the documents submitted to the Commission Council, he stated that the Reported Party had held a tender under Instruction for Bidders No.Q-034210-0000-0000-00-52 for casing and tubing, the requirements whereof caused unfair business competition for the following reasons:

   a) The bidders in the tender were required to offer all items (low and high grade) in a package (document of Reporting Party I No.2 and Reported Party's document No.5);

   b) Bidders possessing only low grade facilities were required to obtain letter of support from business enactors possessing high grade facilities in-country (document of Reporting Party I No.2 and Reported Party's document No.5);

   c) Domestic business enactors possessing the above mentioned high grade facilities are competitors of business enactors possessing low grade facilities only;

   d) The incompleteness of the letter of support as intended hereinabove would cause the disqualification of the bidder concerned (document of Reporting Party I No.2 and Reported Party's document No. 5);

   e) The pipe (mill) source was limited and was oriented to certain sources;

   f) Whereas based on the matters specified by Reporting Party I, the Reported Party is alleged of having violated Article 22 of law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices;

2. Considering whereas according to Reporting Party II in his written statement and in the statement he made in the hearing before the Commission Council as well as the documents submitted to the Commission Council, he stated that the Reported Party's Tender No.Q-034210-0000-0000-00-52 had been held in an unfair business competition due to the following matters:

a) Tender implementation was not announced in the mass media;

b) The invitation for the meeting for the socialization of the introduction of this new tender system was only addressed to pipe processors, without involving agents and traders as in previous tenders (document of Reporting Party II No.1, 2 and 3);

c) Whereas based on the matters as specified by Reporting Party here in above, the Reported Party is alleged of having violated Article 22 of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices;

3. Considering whereas according to the Reported Party's statement before the Commission Council and the documents submitted to the Commission Council the Reported Party stated as follows:

a) Whereas the changes in the requirement of the tender implementation by the Reported Party were the business enactor's policy with the purpose of achieving overall efficiency in order to reduce inventory level, procurement cost and cycle time. For achieving the above-mentioned matters, partners possessing capability facilities and experience and management through consignment system. With this method, the Reported Party would be able to save US$10 (ten) million per year (Reported Party's document No.1);

b) Whereas in order to materialise the Reported Party's above mentioned intention, the Reported Party formed a Joint Committee of the Government-CPI, with its members consisting of elements form the Directorate General of Oil and Gas, Office of the Development Control Minister and Pertamina-BPPKA, who, according to the Reported Party, have the competence to approve the Reported Party's procurement plans (Reported Party's document No.1);

c) Whereas the Reported Party furthermore held a series of socialisation meetings in the context of introduction and request input for the design of the above mentioned new goods procurement system inviting 6 (six) pipe processors (Reported Party's document No.29);

d) Whereas the result of the above mentioned socialisation meeting process was the creation of the new goods procurement system, the implementation whereof remained in compliance with the provisions for the procurement of goods and services namely Presidential Decree Number 16 Year 1994, Decision of the Board of Directors of the State Oil and Gas Company (Pertamina) No. Kpts.108/C000/94-SO, and Pertamina-BPPKA Procedure Bulletin No.077 Rev.II and approved by the Joint Committee of the Government-CPI in the meeting held on December 16, 1999 and approved by Pertamina-BPPKA on December 21, 1999 (Reported Party's document No.36);

e) Whereas prior to conducting the tender for the procurement of casing and tubing, the Reported Party had conducted manufacturer assessment of 8 (eight) potential contractors namely PT. Citra Tubindo Tbk., PT Penta Adi Samudera, PT. Semaless Pipe Indonesia Jaya, PT. Purna Bina Nusa Tbk., PT. Multi Guna Laksindo, PT. Bakrie Pipe Industries, PT. Patraindo Nusa Pertiwi and PT. Pipa Mas Putih (Reported documents No.2, 3 and 79);

f) Whereas based on the 8 (eight) assessed business enactors, the Reported Party concluded that there were 3 (three) potential alternative partnerships, namely between the Reported Party and PT. Seamless Pipe Indonesia Jaya and PT. Bakri Pipe Industries, between the Reported Party and PT. Citra Tubindo Tbk. and between the Reported Party and PT. Purna Bina Nusa, PT. Penta Adi Samudera and PT. Multi Guna Laksindo. Meanwhile, PT. Pipa Mas Putih and PT.

Patraindo Nusa Pertiwi were only suitable for supporting the above specified three alternative partnerships (Reported Party's document No.79);

g) Whereas after the Reported Party had held a meeting with the Joint Committee of the Government-CPI, the Reported Party decided that only 4 (four) pipe processors, namely PT. Citra Tubindo Tbk., PT. Purna Bina Nusa, PT. Seamless Pipe Indonesia Jaya and PT. Patraindo Nusa Pertiwi would be invited to participate in the tender (Reported Party's document No.3);

h) Whereas on March 2, 2000 Herman Hermanto of PT. Citra Tubindo Tbk. presented his proposal that a consortium be formed, so that the aforementioned procurement of casing and tubing would not have to be conducted through a tender, but the appointment of a consortium as the implementor of the above mentioned word would be sufficient, with PT. Citra Tubindo Tbk. acting as co-ordinator who would distribute the work among the consortium members. The Reported Party rejected such proposal and the Reported Party's rejection was approved by the Government;

i) Whereas furthermore the bid opening held on May 2, 2000 was attended by 4 (four) participants who had passed the manufacturer assessment (Reported Party's document No.4);

j) Whereas the Reported Party did not hesitate in applying the new requirements considering that this would enhance the utilisation of domestic industry with high grade and low grade facilities at the same time which is a national policy and it has been stipulated under separate rules;

k) Whereas the Reported Party stated that the indication of mill source in the tender document was only a suggestion in consideration of quality and experience;

l) Whereas the Reported Party did not intend to direct a particular participant to win the tender, the most important matter for the Reported Party was that all criteria set forth by the Reported Party, including the requirement concerning letter of support for the domestic upsetter and heat treater could be met;

m) Whereas the reason for using domestic pipe processors with heat treatment and upsetting was the Government's appeal for obtaining domestic industrial added value;

n) Whereas the Reported Party did not advertise in the mass media because the tender was conducted through direct selection in accordance with the provisions of Presidential Decree Number 16 Year 1994 concerning the Implementation of the State Revenues and Expenditures Budget;

4. Considering whereas in his statement before the Commission council, Witness Ir. Nugroho I. Purbowinoto stated as follows:

a) Whereas in the implementation of the tender for the procurement of casing and tubing, the Reported Party invited only pipe manufacturers or processors;

b) Whereas it is correct that prior to the implementation of tender, socialisation meetings had been held to discuss the tender applying the new requirements which were then approved by all those attending;

c) Whereas the tender awardee had never distributed work to the Witness;

5. Considering whereas in his statement to the Commission Council Witness Drs. Franke Setiadi and Witness Herman Hermanto stated as follows:

a) Whereas invited to the socialisation meeting were PT. Citra Tubindo Tbk., PT. Seamless Pipe Indonesia Jaya, PT. Purna Bina Nusa, PT. Patraindo Nusa Pertiwi, PT. Pipa Mas Putih and PT. Hymindo Petromas Utama;

b) Whereas the purpose of the socialisation meeting held by the Reported Party was to introduce the new system for the procurement of casing and tubing referred as consignment purchase, a system that had been applied before by YPF Maxus Southeast Sumtra BV.;

c) Whereas the Witness was agreeable to the new requirements even though he realised that based on these new requirements there would be business enactors that would not be able to participate in the tender because the tender with this system was not for small-scale entrepreneurs, but indeed for large-scale and strong business enactors;

d) Whereas in one of the socialisation meetings, the Witness refused the effectuation of the tender using the new requirements because the Witness and PT. Seamless Pipe Indonesia Jaya were the only ones capable of meeting the requirements. Therefore, the Witness once proposed that the work not be conducted through a tender, but through the direct appointment of a consortium led by the Witness himself, that would subsequently distribute work to all participants. The Reported Party and the Government rejected the above proposal with the reason that it was contradictory to the existing new regulations;

e) Whereas in the work contract with the Reported Party the opportunity to sub-contract the work to third parties was open, insofar as meeting API requirements;

f) Considering whereas in his statement before the Commission Council Witness Yusuf Ginting and Witness Hendra Kosasih stated as follows:

a) Whereas the Witness admitted to have participated in the series of socialisation meetings held by the Reported Party and the situation in such meetings was such that the Witness had to accept the new tender requirements proposed by the Reported Party;

b) Whereas the Witness stated that in the aforementioned meetings there was a concept proposed by the Reported Party and a concept proposed by PT. Purna Bina Nusa;

c) Whereas had the bid requirements in the aforementioned new tender not prescribed the obligation to bid in one unit or package combining low grade and high grade, it is not certain that PT. Citra Tubindo Tbk. would have been the most competitive;

7. Considering whereas in his statement before the Commission Council and in the documents submitted to the Commission Council, Witness Djurianto and Witness Eryono stated as follows:

a) Whereas the Witness admitted to have participated in a series of socialisation meetings held by the Reported Party (documents of the Witness No. 1 and 2);

b) Whereas the Reported Party did not use pipes requiring heat treatment (high grade), so the package system bid was not important, therefore bidding could have been conducted through separate bidding system for high grade and low grade.

c) Whereas the Witness had no problem with agents or traders being invited to participate in the tender;

d) Whereas the Witness together with other attendants of the socialisation meeting, except for PT. Seamless Pipe Indonesia Jaya and PT. Citra Tubindo Tbk., rejected the new requirements set forth by the Reported Party;

e) Whereas the Witness chose the letter of support from PT. Citra Tubindo Tbk. because it is located in the vicinity of the Witness' factory in Batam;

8. Considering whereas in his statement before the Commission Council, Witness Moch. Poernomo Singgih and Witness Willem L.B. Siahaya, stated as follows respectively:

a) Whereas both Witnesses attended the series of socialisation meetings held by the Reported Party;

b) Whereas according to Witness Moch. Purnomo Singgih, he attended the series of socialisation meetings to ensure the implementation of the Government's policy in using domestic products;

c) Whereas according to Witness Willem L.B. Siahaya the idea to implement procurement using a new system originated from Pertamina, namely in the context of efficiency, cost reduction, competitiveness, utilisation of domestic products and compliance with the regulations;

d) Whereas according to Witness Willem L.B. Siahaya, the consideration for inviting only 6 (six) pipe processors originated from the Joint Committee of the Government-CPI after stock taking;

e) Whereas the package-system tender was to become the policy of all Production Sharing Contractors (PSC) as evident from the Decision of Pertamina's Board of Directors Number 077/C0000/2000-SO Year 2000;

f) Did not notice the direction of tender awardee from the beginning;

9. Considering whereas in his statement before the Commission Council and in the documents submitted to the Commission Council Witness Ir. Lolita and Witness Yosephine Yap stated as follows:

a) Whereas the company managed by the Witness falls under the trader category;

b) Whereas the Witness was not invited and did not attend the socialisation meetings held by the Reported Party;

c) Whereas the Witness was visited by the Reported Party for manufacturer's assessment related to mill source, financial capabilities and others (the Witness' documents No.2 and No.3);

d) Whereas the Witness did not receive and was not notified of the manufacturer's assessment results;

10. Considering whereas in his statement before the Commission Council, Witness Sonny W. Trisulo stated as follows:

    a) Whereas the Witness was invited to the series of socialisation meetings, he however attended the same with the representative of PT. Purna Bina Nusa;

    b) Whereas the Witness objected to the Reported Party's policy in accepting only particular mill source, while there were many others of good quality, as for example Tusal Pipe from Austria and US Steel from the United States;

    c) Whereas the Witness stated he was not agreeable to the package-system tender requirement because it was evident there were only 2 (two) business enactors capable of meeting the same namely PT. Citra Tubindo Tbk. and PT. Seamless Pipe Indonesia Jaya;

    d) Whereas the Witness stated that in the procurement of casing and tubing at Pertamina Prabumulih, tender participants were allowed to import pipes processed with heat treatment and upsetting from overseas provided these were cheaper by 15% as a preferential figure for domestic products;

11. Considering whereas in his statement before the Commission Council, Witness Purnama, Witness Aji Prayudi and Witness Sudarso stated as follows:

    a) Whereas the idea of procurement through the alliance system in Production Sharing Contractors (PSC) circles was initiated based on a comparative study conducted by Willem L.B. Siahaya and several employees of the Reported Party at Chevron and Texaco in The Unites States, the result of which were subsequently reported to Pertamina. The idea was then discussed in the Logistics Communication Forum and within Pertamina itself. The idea was ultimately presented to the Office of the Development Control and the Directorate General of Oil and Gas. Since the idea was not in compliance with Presidential Decree Number 16 Year 1994, it was agreed that the said idea would be introduced in the new Presidential Decree concerning the procurement of goods and services, because at that time discussions were under way concerning the concept of the Presidential Decree that was later stipulated as Presidential Decree Number 18 Year 2000;

    b) Whereas the membership of Pertamina's representative in the so-called Joint Committee of the Government-CPI was not known to Pertamina's Board of Directors, likewise Willem L.B. Siahaya had not been officially appointed as member of the said Committee;

12. Considering whereas in his statement before the Commission Council, Witness Dr.Ir. Rachmat Sudibyo, Witness Subiyanto and Witness Edi Purnomo stated as follows:

    a) Whereas the Directorate General of Oil and Gas stipulated that the import of threaded (*diulir*) casing and tubing was prohibited because there were five business enactors engaging in threading (*ulir*) deemed capable of doing it in-country;

    b) Whereas the consideration of cost reduction in PSC circles was already in the Government's program, following the example of the North Sea project known in Indonesia as KRIS (Cost Reduction Indonesia Style);

c) Whereas there are not yet manufacturers capable of manufacturing seamless pipes in Indonesia, therefore it should be started with threading, upsetting, then heat treatment, the Government's plan is that Indonesia must be capable of manufacturing casing and tubing domestically;

d) Whereas the purpose of the involvement of the Directorate General of Oil and Gas in the Joint Committee of the Government-CPI and in the socialisation meetings held by the Reported Party was only to serve as a source of reference for ensuring that there was competition, that domestic products were prioritised and that there were no violations of the regulations;

e) Whereas the Letter of the Director General of Oil and Gas Entrepreneurship Guidance Number 005/936/DMB/1992 concerning the Utilisation of Domestic Heat Treatment and Threading Facilities was only an appeal and not a requirement;

13. Considering whereas in his statement before the Commission Council, Reported Party I provided the following additional statement:

a) Whereas PT. Purna Bina Nusa submitted 2 (two) requests for a letter of support to PT. Citra Tubindo Tbk. for the tender of the Reported Party No.Q-034210-0000-0000-00-52, namely on April 12, 2000 and on April 26, 2000, which was not obtained up to May 1, 2000 (one day prior to bid submission and bid opening);

b) Whereas Reporting Party I stated that on May 1, 2000 at +_ 19:30 hours the team of PT. Purna Bina Nusa that was going to attend the bid opening on May 2, 2000 was invited by the team of PT. Citra Tubindo Tbk. to Hotel Aryaduta Pekanbaru to meet in a room rented by PT. Citra Tubindo Tbk. In the said meeting PT. Purna Bina Nusa was forced to open and show its bid documents to be examined by PT. Citra Tubindo Tbk. as a condition for obtaining a letter of support from PT. Citra Tubindo Tbk.;

c) Whereas Reporting Party I stated that the above mentioned meeting was also attended by Pahlevi, in his capacity as the representative of PT. Patraindo Nusa Pertiwi, who had also been asked to do the same thing as a condition for obtaining the letter of support of PT. Citra Tubindo Tbk.;

14. Considering whereas in his statement before the Commission Council, the Witness whose identity has been kept secret by the Commission Council, stated as follows:

a) Whereas it is correct that a meeting was held in a room at the Hotel Aryaduta Pekanbaru on May 1, 2000 at about 19:30 hours West Indonesia Time, one day prior to the bid opening on May 2, 2000;

b) Whereas it is correct that in the above mentioned meeting PT. Purna Bina Nusa was requested to show its bid price to PT. Citra Tubindo Tbk. as a condition for obtaining a letter of support from PT. Citra Tubindo Tbk. After the representative of PT. Citra Tubindo Tbk. had seen the above mentioned price, the above mentioned proposal was sealed in the presence of PT. Citra Tubindo Tbk. and it was submitted to the tender committee on the following day;

c) Whereas the Witness confirmed that the representative of PT. Patraindo Nusa Pertiwi, namely Pahlevi, was also in the room where the above mentioned meeting took place;

d) Whereas the Witness heard that PT. Citra Tubindo Tbk. promised it would give work to PT. Purna Bina Nusa if it was awarded the tender;

15. Considering whereas in their statement before the Commission Council, Expert Ir. Indradjit Kartowijono and Expert Ir. Sarwi Notoatmodjo were of the opinion that seen from the normative aspect, there were no indications of violation by the Reported Party, however, there was a need to study whether the aforementioned new requirements had gone through adequate and comprehensive socialisation process to related business enactors;

16. Considering whereas based on the facts disclosed in the hearing, both in the testimony of Witnesses as well as in the documents submitted to the Commission Council, and the written responses by the Reported Party, the Commission Council established the following facts:

    a) Whereas the Reported Party is an Indonesian legal entity known by the name of PT. Caltex Pacific Indonesia, having its office address in Sarana Jaya Building, Jalan Budi Kemuliaan I No.1, Jakarta 10340;

    b) Whereas the Reported Party, for the procurement of casing and tubing for 3 (three) years setting the price annually, held tender No.Q-034210-0000-0000-00-52 for which bid opening was conducted on May 2, 2000 in Rumbai;

    c) Whereas in the above mentioned tender the Reported Party introduced a new requirements, namely a one-package bid system combining low grade and high grade;

    d) Whereas the Reported Party had been aware from the beginning that under the one-package system there would only be 2 (two) business enactors meeting such requirement, namely PT. Citra Tubindo Tbk. and PT. Seamless Pipe Indonesia Jaya;

    e) Whereas the Reported Party set the requirement for tender participants possessing only low grade facilities to enclose a letter of support from business enactors possessing high grade facilities;

    f) Whereas the Reported Party required that such letter of support come from domestic business enactors by virtue of the Government's appeal indicated in the Letter of the Director General of Oil and Gas Entrepreneurship Guidance, Directorate General of Oil and Gas, Department of Mines and Energy of the Republic of Indonesia Number 005/396/DMB/1992 dated January 4, 1992 concerning the Utilisation of Heat Treatment and Threading Facilities in-country;

    g) Whereas for introducing the tender with such new requirements, the Reported Party held a series of socialisation meetings, starting with Jakarta, Batam, Anyer and back in Jakarta inviting only 6 (six) pipe processor business enactors namely PT. Citra Tubindo Tbk., PT. Seamless Pipe Indonesia Jaya, PT. Purna Bina Nusa, PT. Patraindo Nusa Pertiwi, PT. Pipa Mas Putih and PT. Hymindo Petromas Utama;

    h) Whereas the Reported Party conducted manufacturer assessment activities from September 21-28, 1999 involving 8 (eight) business enactors, namely PT. Citra Tubindo Tbk., PT. Penta Adi Samudera, PT. Seamless Pipe Indonesia Jaya, PT. Purna Bina Nusa, PT. Multi Guna Laksindo, PT. Bakrie Pipe Industries, PT. Patraindo Nusa Pertiwi and PT. Pipa Mas Putih. Based on the result of the above mentioned manufacturer assessment, the Reported Party recommended 3 (three) alternative partnerships, namely partnership between the Reported Party and PT. Seamless Pipe Indonesia Jaya and PT. Bakrie Pipe Industries, between the Reported Party and PT. Citra Tubindo Tbk., between the Reported Party and PT. Purna Bina Nusa, Pt. Penta Adi Samudera and PT. Multi Guna Laksindo. Meanwhile, PT. Pipa Mas Putih and PT. Patraindo Nusa Pertiwi were only as supporters of the above mentioned three alternative partnerships;

i) Whereas after the Reported Party had held a meeting with the Joint Committee of the Government-CPI, it was decided that only 4 (four) business enactors had been qualified, namely PT. Citra Tubindo Tbk., PT. Seamless Pipe Indonesia Jaya, PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi, whereas the procurement system would be implemented through tender;

j) Whereas PT. Citra Tubindo Tbk. proposed to form a consortium of pipe processors so that the aforementioned procurement of casing and tubing would not have to be conducted in the form of a tender, but it would be sufficient to appoint the consortium as the work implementor with PT. Citra Tubindo Tbk. acting as co-ordinator who would subsequently distribute work to consortium members. Such proposal was not approved by the Reported Party and the Government, so that the procurement of casing and tubing was conducted through a tender;

k) Whereas out of the 4 (four) pipe processors invited to participate in the tender, only 2 (two) pipe processors were capable of meeting the requirements set by the Reported Party, whereas the 2 (two) pipe processors not possessing high grade facilities in accordance with the requirements were required to obtain a letter of support from business enactors possessing such facilities;

l) Whereas the requirement for obtaining the letter of support has been a common practice. In the above mentioned tender, bidders were not allowed to request a letter of support from foreign business enactors as a consequence of the Government's appeal included in the Letter of the Director General for Oil and Gas Entrepreneurship Guidance, Directorate General of Oil and Gas, Department of Mines and Energy of the Republic of Indonesia Number 005/396/DMB/1992 dated January 4, 1992 concerning the Utilisation of Heat Treatment and Threading Facilities in-country, whereas there were only 2 (two) domestic business enactors capable of issuing such letter of support, namely PT. Citra Tubindo Tbk. and PT. Seamless Pipe Indonesia Jaya who were in fact competitors of the tender participants;

m) Whereas PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi requested a letter of support from PT. Citra Tubindo Tbk. considering that the location of PT. Citra Tubindo Tbk. in Batam was more economical compared to the location of PT. Seamless Pipe Indonesia Jaya in Cilegon, bearing in mind that the Reported Party's warehouse receiving goods is located in Dumai, the Province of Riau;

n) Whereas the letter of support provided by PT. Citra Tubindo Tbk. to PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi was provided on May 1, 2000 namely one day prior to the bid opening, at about 19:30 hours West Indonesia Time in a room at the Hotel Aryaduta Pekanbaru. The said letter of support was provided after PT. Citra Tubindo Tbk. had requested PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi to show the bid price that would be submitted at bid opening on May 2, 2000 and PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi agreed to show the said bid price because they had been promised to receive work from PT. Citra Tubindo Tbk.;

o) Whereas the bid opening held on May 2, 2000 was attended by 4 (four) participants namely PT. Citra Tubindo Tbk. with a bid price of US$15,447,672, PT. Purna Bina Nusa with a bid price of US$15,872,954, PT. Patraindo Nusa Pertiwi with a bid price of US$15,966,092 and PT. Seamless Pipe Indonesia Jaya with a bid price of US$16,103,020 so that PT. Citra Tubindo Tbk. was determined as the awardee with the lowest bid price;

17. Considering whereas based on the above mentioned facts, the Commission Council has concluded that in the implementation of tender No.Q-034210-0000-0000-00-52 held by the Reported Party with the bid opening held on May 2, 2000 in Rumbai, Pekanbaru, a collusion occurred among PT. Citra Tubindo Tbk. and PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi, to arrange and or determine the tender awardee leading to unfair business competition. This is evident from the meeting in a room at the Hotel Aryaduta Pekanbaru on May 1, 2000 at about 19:30 hours West Indonesia Time for obtaining a letter of support for high grade facility. The Reported Party should have suspected from the beginning that the aforementioned collusion would occur, because the Reported Party had realised from the beginning that there would only be 2 (two) business enactors meeting the aforementioned requirements namely PT. Citra Tubindo Tbk. and PT. Seamless Pipe Indonesia Jaya so that such unbalanced position was extremely sensitive to the occurrence of collusion. Therefore the Reporting Party is deemed not to have been exercised adequate prudence in ensuring fair business competition. Meanwhile the letter of appeal issued by the official of the Directorate General of Oil and Gas of the Department of Mines and Energy of the Republic of Indonesia Number 005/396/DMB/1992 dated January 4, 1992 by virtue of the Stipulation of the People's Consultative Assembly Number XX/MPRS/1966 and Number III/MPR/2000 concerning Legal Source and Hierarchy of Laws and Regulations does not fall under the hierarchy of legislation used as a basis for exemption as intended in Article 50 sub-article a of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices. For such purpose, the Commission Council suggests to the Government in relation to efforts for the utilisation of domestic products to stipulate the same in a clear and certain provision and in compliance with Law Number 5 Year 1999;

18. Furthermore, the Commission Council has concluded that there has been a collusion among tender participants, namely PT. Citra Tubindo Tbk., PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi, for the determination of tender awardee which is a violation of Article 22 of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic And Unfair Business Competition Practices;

19. Considering whereas Article 22 of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices contains the following elements:

    a) Business enactor;

    b) Collusion;

    c) Arrange and or determine tender awardee;

    d) Occurrence of unfair business competition;

Ad.a. Business enactor;

- Considering whereas referred to as business enactor under Article1 sub-article 5 of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices shall be defined as "Any individual or business entity, either incorporated as a legal entity or not incorporated as legal entity established and domiciled or engaging in activities in the jurisdiction of the state of the Republic of Indonesia, either jointly or severally through agreement, conducting various business activities in the field of economics";

- Considering whereas based on the examination it has been found that PT. Citra Tubindo, Tbk., PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi are business enactors in accordance with the above mentioned definition;

- Considering whereas based on the above mentioned considerations, the Commission Council is the opinion that the business enactor element has been met;

Ad. b. Collusion.

- Considering whereas referred to as collusion in Article 1 sub-article 8 of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices is defined as "Forms of co-operation conducted by business enactors with other business enactors with the intention of controlling the market concerned for the benefit of the business enactors involved in collusion";

- Considering whereas based on the examination it was proven that there had been a meeting between PT. Citra Tubindo Tbk. and PT. Purna Bina Nusa, and PT. Patraindo Nusa Pertiwi at the Hotel Aryaduta Pekanbaru on May 1, 2000 at about 19:00 hours West Indonesia Time to arrange and or determine the tender awardee by showing to each other bid prices that were going to be submitted at the bid opening;

- Considering that based on the above mentioned considerations the Commission Council is of the opinion that the collusion element has been met;

Ad. c. Arrange and or determine tender awardee

- Considering whereas referred to as arranging and or determining tender awardee is an interaction process among tender participants who determine the tender awardee among themselves;

- Considering whereas there was an agreement to provide a letter of support to PT. Citra Tubindo Tbk. to PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi under the condition that PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi had to show first their respective bid prices to PT. Citra Tubindo Tbk., so that PT. Citra Tubindo Tbk. could offer a lower price than PT. Purna Bina Nusa and PT. Patraindo Nusa Pertiwi whereas TP. Citra Tubindo Tbk. promised it would give work to PT. Purna Bina Nusa. It was further proven that the tender was awarded to PT. Citra Tubindo Tbk.;

- Considering whereas based on the above considerations the Commission Council is of the opinion that the elements of arranging and or determining the tender awardee have been met;

Ad.d. Occurrence of unfair business competition.

- Considering whereas referred to as unfair business in Article 1 sub-article 6 of Law Number 5 Year 1999 concerning Monopolistic and Unfair Business Competition Practices is defined as "Competition among business enactors engaging in production activities and or the marketing of goods and or services conducted in a dishonest or unlawful manner or in a manner hampering business competition";

- Considering whereas based on the examination, PT. Citra Tubindo Tbk. offered its price after having seen the bid price of its competitors;

- Considering whereas based on the above considerations, the Commission Council is of the opinion that the element of unfair business practice element has been met;

20. Considering whereas based on the above considered facts, the Commission Council is of the opinion that the determination of the awardee of tender No.Q-034210-0000-0000-00-52 held by the Reported Party the bid opening for which was held on May 2, 2000 in Rumbai, Pekanbaru was conducted through collusion among tender participants in violation of Article 22 of Law Number 5 Year 1999 concerning the Prohibition of Monopolistic and Unfair Business Competition Practices;

HAS DECIDED TO:

1. DECLARE THE PROCUREMENT OF CASING AND TUBING THROUGH TENDER NO.Q-034210-0000-0000-00-52 LEGALLY AND CONCLUSIVELY PROVEN TO HAVE VIOLATED ARTICLE 22 OF LAW NUMBER 5 YEAR 1999, BECAUSE THE TENDER AWARDEE WAS DETERMINED THROUGH COLLUSION AMONG TENDER PARTICIPANTS;

2. ORDER THE REPORTED PARTY NAMELY PT. CALTEX PACIFIC INDONESIA TO HALT CASING AND TUBING PROCUREMENT ACTIVITIES BASED ON TENDER NO.Q-034210-0000-0000-00-52 BY NO LATER THAN 30 (THIRTY) DAYS FROM THE TIME THE REPORTED PARTY RECEIVES A NOTIFICATION ON THE DECISION.

Hence this Decision has been made and read out before the court session open to the public on Friday, April 20, 2000 by me, Commission Member IR. H. Mohammad Iqbal acting as the Chairperson of the Commission Council and Soy Martua Pardede, SE and Ir. H. Tadjuddin Noer Said, respectively Members of the Commission Council, assisted by Etty Nurhayati, SH the Clerk of the Commission Council.

III. – ANSWERS TO THE QUESTIONNAIRE

1. **Question 1(a)** -- Background Information

The respondents' names: PT. Caltex Pacific Indonesia; PT. Citra Tubindo Tbk.; PT. Purna Bina Nusa; and PT. Patraindo Nusa Pertiwi.

The covered product or service: Oil pipe and pipe processing services.

The geographic area: The definition of a geographic market was not an issue in the case, the bid-rigging conspiracy, however, affected the provision of oil-pipe and oil-pipe processing services on Riau, Indonesia.

The beginning and ending dates of the cartel: The bid-rigging conspiracy was formed on May 1, 2000; the KPPU ordered that the illegal contract be undone on April 20, 2001.

2. **Question 1(b)** -- The Evidence of Collusion

Evidence of the bid-rigging conspiracy was direct and testimonial, coming to the KPPU's attention through the testimony of a complainant (whose identity must be kept confidential under Indonesian law), as well as the testimony of witnesses from respondents Citra, Purna, and Patraindo, who were called to testify before the KPPU.

3. **Question 1(c)** -- Amount of Commerce Affected

The oil pipe and pipe processing services contract that was the subject of the bid-rigging conspiracy was valued at U.S. $15,447,672 (based on the price of the lowest bid).

4. **Question 1(d)** -- Sanctions Imposed

As *Caltex* is the first case ever brought by the KPPU, no fines or other direct financial sanctions were imposed. Instead, the KPPU ordered that the contract between Caltex and Citra (the apparent lowest bidder) be undone and that the entire tender process be redone.

5. **Question 2(a)** -- Statements Concerning the Cartel's Effect on Price

As reported in the KPPU's *Caltex* decision, on May 1, 2000, the day before Caltex was to open the bids for oil-pipe processing services, Citra, Purna, and Patraindo met in a hotel to discuss their bids. At this meeting, Citra agreed to give both Purna and Patraindo so-called "letters of support," conditioned on Purna and Patraindo agreeing to reveal to Citra the bids they intended to submit to Caltex. Purna and Patraindo shared their bids with Citra, and Citra gave them letters of support. The bids were then sealed in the presence of the other conspirators. Additionally, Citra promised Purna some work under the contract, assuming Citra was awarded the contract.

6. **Question 2(b)** -- Evidence Concerning the Cartel's Effects

As described above, the conspiracy successfully rigged the price for the bid for the oil-pipe processing services contract with Caltex.

7. **Question 2(c)** -- Colorful Statements by the Cartel's Members

Transcripts and verbatim statements of the conspirators testimony before the KPPU are not a matter of public record, except to the extent reported in the KPPU's decision. According to an article appearing in the *Jakarta Post* on May 1, 2001, entitled "Citra Tubindo Denies Conspiracy Allegation," however, a representative of Citra is quoted as saying: "'Yes, KPPU questioned Citra, but not about any conspiracy. The commission only asked technical questions about the process of the tender, etc. and suddenly there is this verdict that we were involved in a conspiracy.'" The article goes on to quote the Citra representative as saying: "'We never disclosed our bid or whatever it was the KPPU accused us of."

8. **Question 2(d)** -- Demonstrations of the Cartel's Harm

Because the KPPU was able to uncover this bid-rigging conspiracy relatively shortly after it occurred, and because the KPPU ordered that the contract resulting from the rigged bid be undone while it still had more than two years to run, the conspiracy's harm was kept to a minimum. This also is reflected in an article appearing in the *Jakarta Post* on May 17, 2001, entitled "Caltex to Terminate Contract with Citra Tubindo," in which a Caltex spokesperson is quoted as saying:

"'We are grateful to the KPPU [the antimonopoly commission] for having uncovered the conspiracy behind the tender, and even without the verdict Caltex would have immediately terminated the contract because it runs contrary to business ethics.'"

9. **Question 4** -- Standards of Proof and the Sanctions for Violations of the Law

Standards of proof: Law Number 5 of 1999 incorporates both rule of reason and per se illegality concepts in its prohibitions of anticompetitive business practices. Most violations of Law Number 5 require that the KPPU find that the respondents' illegal conduct resulted in "monopolistic practices" or "unfair business competition." These terms are defined in Article 1, subsections 2 and 6, of Law Number 5 as follow:

(a) "Monopolistic practices shall be the centralization of economic power by one or more business enactors, resulting in the control of the production and/or marketing of certain goods and/or services thus resulting in unfair business competition and potentially harmful to the interests of the public."

(b) "Unfair business competition shall be competition among business enactors in conducting activities for the production and/or marketing of goods and/or services in an unfair or unlawful or anticompetition manner."

Available sanctions: As set forth in Articles 47 and 48 of Law Number 5 of 1999, the KPPU's remedial powers are as follow:

(a) Civil Remedies (Article 47):

(1) Declare unlawful agreements null and void.
(2) Require restructuring of firms guilty of illegal vertical integration.
(3) Issue cease and desist orders to stop activities causing monopolistic practices, unfair business competition, or the abuse of dominant position.
(4) Cancel mergers or consolidations in violation of the law.
(5) Order compensation for damages by violators to injured parties.
(6) Impose civil fines up to Rupiah 25 billion (approximately U.S. $2.5 million) for violations of the law.

(b) The KPPU may seek criminal penalties, for certain violations enumerated in Article 48, through submission of the case to police investigators, who in turn may refer the matter to the public prosecutor and, ultimately, the courts.

(1) Criminal fines up to Rupiah 100 billion (approximately U.S. $10 million).
(2) Prison sentences of up to six months.

10. **Question 5** -- General Principles for Calculating Fines and Other Sanctions

Article 47 of Law Number 5 of 1999, which concerns sanctions, does not provide any specific guidance on how fines are to be calculated and, to date, the KPPU has not adopted or issued any guidelines concerning the calculation of fines.

The maximum fines permitted under Law Number 5 of 1999 are set forth in response to the question immediately above.

IV - PROMOTING COMPLIANCE & EDUCATING BUSINESSES ABOUT COMPETITION LAW: INDONESIA'S EXPERIENCE
(-- For Session II --)

Introduction

In addition to creating the Commission for the Supervision of Business Competition ("KPPU"), Indonesia's first agency charged with investigating and enforcing the nation's new competition law, Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition tasks the KPPU with educating businesses and the public about the competition law and promoting compliance with the law.[1] As described below, Law Number 5's "socialization" process started well before the law actually came into effect, and the need to educate businesses, the public, the press, and the courts about the law likely will need to continue for many years to come.

The purpose of this paper is to review some of the activities that already have been undertaken in Indonesia to promote the socialization of, and compliance with, Law Number 5. It is also hoped that this paper, in conjunction with discussions during the course of the OECD Global Forum on Competition, will spur additional ideas about how law enforcement agencies might best develop programs to educate business and others about the existence and meaning of competition law in a systematic, continuous, on-going manner.

Background on Law Number 5 of 1999

Law Number 5 of 1999 is Indonesia's first comprehensive law prohibiting monopolistic practices and unfair business competition. Prior to its passage on March 5, 1999, legal provisions touching on competition were fairly limited in scope and could only be found as snippets of law scattered throughout numerous codes and statutes, including both Indonesia's criminal and civil codes.[2]

The interest in developing a comprehensive competition law in Indonesia dates back to around 1990. It was at this time that legal scholars as well as members of various political parties, non-governmental organizations, and certain government institutions began to discuss the need for such a law. In fact, a number of different groups, including the Indonesian Democratic Party and the Indonesian Ministry of Trade (in cooperation with the Faculty of Law University of Indonesia), produced draft competition laws. These proposed draft laws, however, were not given serious attention by those in power at the time, because much of the unfair business competition and monopolistic practices that was taking place, often by Indonesia's largest industries and businesses, was the result of direct and active government support. Crony capitalism was the order of the day under the so-called "New Order" government of former President Soeharto, right up to about 1998.

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1 See, for example, Law Number 5, Article 30 (1) (establishing the KPPU to supervise the implementation of Law Number 5) and Article 35 f (giving the KPPU responsibility to prepare guidelines and publications related to the law).

2 See, for example, Criminal Code of 1945, Article 382 bis (concerning fraud and unfair business practices); and Civil Code of 1945, Article 1365 (concerning the recovery of damages by private parties for violations of the law).

While Law Number 5's passage in 1999 came about in part to satisfy conditions of a Letter of Intent entered into between the Indonesian government and the International Monetary Fund in July 1998, the law's passage also drew much support from politicians, the government, the public, and the press as a means to address growing concerns about monopolistic practices and unfair business practices stemming from the closely related practices of rampant corruption, collusion, and nepotism (known by the Indonesian acronym "KKN") that had been taking place in Indonesia between the government and favoured businesses.

Law Number 5 was passed by the House of Representatives ("DPR") on February 18, 1999, and it was signed into law by Indonesia's President on March 5, 1999, with an effective date of March 5, 2000. The competition law's effective date was purposely set one year after its passage in order to provide time for socialization of the new law. Moreover, businesses were given an additional six-month grace period under the law, until September 5, 2000, to come within compliance of the law.[3] This grace period undoubtedly was included in the law to give businesses, the public, and others a clear signal that the rules of doing business in Indonesia were about to change -- perhaps dramatically.

Efforts to Educate Businesses Regarding Law Number 5 of 1999

The major activity that the KPPU and the government of Indonesia (primarily through the Ministry of Industry and Trade, Law Number 5's original sponsor within the government), have undertaken to socialize businesses and others about the new competition law has been through the sponsorship of, and participation in, conferences and presentations to various target groups in cities throughout the Indonesian archipelago.

Specifically, conferences have been held with:

1. Universities
2. Industry Groups, Business Associations, and Trade Sectors, including the Indonesian Chamber of Commerce ("KADIN")
3. Local Governments
4. Government Ministries and Institutions
5. General Audiences and the Public

These conferences have taken place in most of Indonesia's largest cities, and some of its regional capitals, including: Jakarta, Surabaya, Jogyakarta, Makassar, Bandung, Medan, Manado, Denpasar, Malang, and Palembang.

The focus of such conferences has been first to simply make the various constituencies aware that Indonesia has a law concerning the prohibition of monopolistic practices and unfair business competition. These meetings included activities as simple as distributing copies of the law. The focus then shifted to more detailed discussions about the law's operative provisions, that is, the kinds of business practices -- such as price fixing, bid rigging, market division, abuse of dominant position, and certain vertical restraints of trade -- likely to draw the most scrutiny by the KPPU. These discussions also covered the general modes of competition law analysis, with specific reference to the concepts of the "rule of reason" and "per se" illegality, and they touched upon some of the more significant economic concepts underlying sound

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3 See Article 52(2) ("Business enactors having entered into agreement and/or conducting activities and/or undertaking actions not complying with the provisions of this law shall be given 6 (six) months from this Law's coming into effect to make adjustments.")

enforcement of competition law, such as market power, barriers to entry, and identifying likely competitive effects. Finally, such socialization conferences covered the role and organization of the KPPU, how the KPPU handles investigations and processes cases, and how to properly lodge a complaint with the KPPU.

In addition to conferences sponsored by the government and the KPPU, various private, non-governmental organizations ("NGOs"), such as the Partnership for Business Competition, the Center for Indonesian Law and Policy Studies, and the Center for Strategic and International Studies also have sponsored conferences and workshops targeting many different Indonesian constituencies including businesses and business associations, government organizations, the courts, the press, and the public, to assist in the process of educating interested parties about Law Number 5. These conference typically included the participation of KPPU Commissioners and other government officials, and generally covered the same topics as those identified above. Thus, many socialization activities in Indonesia have been the product of close, coordinated public-private cooperation.

Many of the socialization activities of the NGOs have been underwritten, at least in part, by international donor agencies such as the U.S. Agency for International Development, Germany's Gesellschaft für Technische's Zusammenarbeit, Australian Agency for International Development, Canadian International Development Agency, World Bank, Asian Development Bank, and others. Given the involvement of the donor agencies, many socialization conferences have included the participation of notable antitrust scholars and government enforcement officials from the United States, Germany, Canada, Australia, Japan, Korea, and other countries.

Public Hearings and the Dissemination of Decisions

Other important activities that the KPPU has undertaken to socialize businesses and the public about Indonesia's new competition law include public hearings and the public dissemination of the KPPU's decisions.

The KPPU has adopted operating procedures for the conduct of public hearings that are used to investigate highly concentrated industries in which there may be violations of Law Number 5.[4] As part of this process, companies in these highly concentrated industries, together with other industry participants and interested parties, have been invited to appear before the KPPU to give testimony and to answer questions. These sessions have been open to the public and have been well attended by the press and other observers. Such sessions provide businesses and others insights into how the KPPU operates and how the KPPU thinks about and applies the law. To date, such public hearings have taken place in the following industries:

1. Paper and Pulp
2. Wheat Flour
3. Day-Old Chickens

Additionally, the KPPU has adopted the practice of issuing written decisions when it decides a case and then disseminating these decisions in open, public session. Such decisions include: (1) a summary of the evidence collected, including the witnesses who testified before the KPPU and the documents reviewed; (2) the KPPU's findings of fact; (3) the KPPU's conclusions of law; and (4) the sanctions being ordered. The practice of issuing written decisions may not at first appear to be so remarkable, but one must consider that to this day even Indonesia's Courts of Appeal ("High Courts") do

4 See KPPU Decision Number 8 of 2000, concerning "Consultation Meetings."

not issue written decisions most of the time; additionally, the written decisions of the Indonesia's Supreme Court are often difficult to locate, even for Indonesians.

To date, the KPPU has completed two investigations resulting in the imposition of sanctions -- the *Caltex* and the *Indomaret* case. Accordingly, the KPPU has issued two written opinions. The public sessions at which these decisions were read were well attended by representatives from various businesses, the press, and the public.

Socialization Activities Being Planned

In addition to the socialization activities described above, the KPPU currently is in the process of planning and developing two additional projects intended to educate businesses and others about Law Number 5. First, the KPPU is planning to develop its own website. Although some materials related to the KPPU and Law Number 5 are currently available on other's websites, most notably that of the Partnership for Business Competition (www.pbc.or.id), the KPPU is interested in developing its own website. Such a site would include copies of all of the KPPU's decisions, the KPPU's internal operating procedures, background information about the KPPU, its membership, and how it is organized, and instructions on how to file a complaint. Much of this material already has been translated into English, and English versions of key materials also would be posted on the site.

Second, the KPPU is planning for the publication of guidelines and instructional pamphlets intended to explain Indonesia's competition law in a straightforward, non-technical manner, for the benefit of businessmen, the public, and the press. Guidelines would be written to cover topics such as cartels and horizontal restraints of trade, vertical restraints of trade, and abuse of dominant position. Pamphlets might also be written explaining how the KPPU is organized, how it does its job, and how to file a complaint about suspected violations of the law.

Conclusion

The socialisation of competition law faces some challenges in Indonesia that make it somewhat more difficult than in many other countries. Although it is not commonly known, Indonesia is the world's fourth most populous county, with a population of over 220 million. Our people, in turn, comprise more than 350 different ethnic groups and speak more than 300 different languages (although most Indonesians also do speak a common language known as "Bahasa Indonesia"). Further, Indonesia is an archipelago consisting of more than 13,000 islands, of which more than 6,000 are populated.[5] These island are spread out over an area of 3200 miles east to west and 1,250 miles north to south (an area significantly larger than the United States). In terms of political subdivisions, the country consists of 30 provinces, which are further subdivided into more than 300 districts and municipalities. Obviously, given these geographic and demographic conditions, effectively getting the word out about the new competition law is a daunting task.

Nonetheless, the KPPU believes that it is up to the challenge. With the assistance of Indonesia's government, NGOs, international, donor agencies, businesses, the press, and the public, we have successfully undertaken the "get-the-word-out" phase of Law Number 5's socialization. We now are interested in moving into the next phase. Learning about the kinds of activities that other countries -- both developed and developing -- have undertaken to promote the socialization of their competition laws is one

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5 Most of the population, however, lives on one of Indonesia's five main islands: Java, Sumatra, Kalimantan, Sulawesi, and Irian Jaya.

of the key components of planning for this next phase. In this regard, we are interested in -- and welcome the opportunity to discuss -- ideas of how to develop and implement a sustained, continuous program of socialization and business compliance, capable not only of building upon our past successes, but capable of ensuring that the people of Indonesia get the benefits of competition that they expect and deserve.

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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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OECD Global Forum on Competition

CONTRIBUTION FROM KENYA

This contribution was submitted by KENYA as a background material for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

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COMPETITION POLICY AND LAW IN KENYA

1. INTRODUCTION

Prior to Kenya's attainment of Self-Rule in June 1963 and full Independence on 12th December 1963, the degree of industrialisation and monetisation of the economy was rudimentary (very low). Most of consumer items such as sugar, fats, razor blades, pangas, jembes, etc which were needed by the settler community were imported from United Kingdom. In Kenya itself, the interests of the consuming settlers were protected through a Price Controller Regime which ensured that consumers of essential goods and services were not exploited by traders through the Price Control Act of 16th October 1956.

Kenya embarked on a process of rapid industrialisation and indigenisation of the economy on the attainment of independence on 12th December 1963 through the setting up of import substitution industries to meet Kenyan and East African Community requirements and the transfer of non-citizen firms to Kenyans. To this end, the independent Administration of Kenya enacted the trade Licensing Act, Cap. 497 of the Laws of Kenya which legalised the take-over of non-citizen firms by citizens of Kenya through denial of Trade Licenses to certain Trades and Businesses. The Administration also legalised the control of the importation and exportation of goods of any description and the control of supplies essential to the life or well-being of the community through legal Notice No. 303 of 1964 under the Imports, Exports and Essential Supplies Act, Cap. 502 of the Laws of Kenya.

Briefly therefore, the commercial activities of Kenya were regulated mainly through instruments provided under the Price Control Act, Trade Licensing Act and Imports, Exports and Essential Supplies Act which included among others the following instruments:-

I. Fixing of prices of certain goods and services.
II. Transfer of certain businesses from non-citizens to citizens of Kenya
III. Establishment of imports substitution industries
IV. Imports and Exports licensing.
V. Establishment of import quotas for certain goods.
VI. Complete banning of imports of certain goods.
VII. Letters of No Objection.
VIII. Allocation of Foreign Exchange.
IX. Fixed Exchange Rate.

Kenya's industrialisation programme through imports substitution strategy reached saturation point in mid 1970s and the programme was hard hit by the collapse of the E.A. Community which resulted in Tanzania and Uganda opening their markets to imports from China, Taiwan, Korea, India, etc. With the loss of the larger captive East African market, Kenya's domestic industries found themselves with a very small domestic market and products which could not compete in the export markets because of their high prices, low quality, poor packaging, poor design etc. This was followed by falling (decreasing) employment opportunities and falling standard of living for Kenyans.

To reverse the trend of economic decline, it became abundantly clear that Kenyan industries must produce not only for domestic market but also for the export market. The Government therefore decided in the mid 1970s to expose them to competition first in the domestic market by allowing some imports so as to prepare them for export market competition. Competing imports were selectively allowed into the Kenyan market ; banned items were progressively removed from the list of banned items and price controlled items removed from price control lists progressively. In addition, additional industries were licensed to boost domestic competition, lower consumer prices, increase employment opportunities, improve the efficiency in the use and allocation of scarce resources to competing needs.

The policy was aimed at the improvement of the marketability (competitiveness) of Kenyan products in the export market, increase job opportunities, lower the cost of living and raise the standard of living for the Kenyans throughout the Republic.

2.0 Evolution of Competition Policy and Law

The proposal for the Development of a Competition Policy and the enactment of a law to support the implementation of such a policy in Kenya was advanced in 1982 by the Working Party on Government Expenditure (WPGE). The proposal is contained in Chapter III, Pages, 24-27 of the WPGE Report which noted that, as direct Government intervention in the economy via state-owned commercial enterprises diminishes, « more reliance will be put on policy instruments to influence firm management and industrial decisions on product choice, investment and employment. » The Report further noted that, « as private sector activities and community efforts increase in scope and magnitude, opportunities for abuses, favouritism and exploitation may also increase ».

More specifically, paragraphs 87-91 spelt out the WPGE views on the type of legislation and institutions that Kenya needed to facilitate the desirable changes from a controlled economy to a market oriented free economy. Pararaph 90 in particular stipulated that, « It is, therefore, recommended that legislation with respect to unfair practices be enacted and that a Monopolies and Prices Commission be established to enforce it. This Commission should also assume the functions of the present Price Control Department of The Treasury . The Commission should be empowered to collect annually standardised financial information on all public companies and to investigate complaints relating to unfair market prices and practices. Such a Commission should have quasi-judicial powers analogous to those of the Industrial Court, and should be able to impose sanctions for practices in restraint of fair trade as defined in the legislation ».

Paragraph 91 touched on the manning of the institution that the economy would expect to be able to regulate the conduct and the structure of the market so as to obtain the desired performance in the market place and noted that « The Commission will require a staff of economists and financial analysts to report on market conditions, paying particular attention to movements in prices and costs at all levels of production and distribution and their effects on both supply and demand. Apart from its regulatory function it should contribute to Government policy formulation in matters affecting trade, production and prices . »

The WPGE principal objective in its recommendations for a competition policy legislation and establishment of suitable institutions for the administration and enforcement of the Policy and Law, was to provide Kenya with an instrument for influencing resource allocation in constructive directions while helping to curb the abuses associated with unbridled private enterprise.

The WPGE recommendations of 1982 gave advocates of a liberalised economy both in Government and private sector food for thought and studies were undertaken between 1983 and 1985. Towards the end of 1985, a comprehensive cabinet memorandum was prepared and submitted to the Cabinet proposing the enactment of a law prohibiting Restrictive Trade Practices and the establishment of a Monopolies and Prices Commission in Kenya. The Cabinet approved the proposal and mandated the then Ministry of Finance and Economic Planning to consult widely with other relevant Government Ministries and Departments so as to be able to draft a suitable bill for debate and enactment by the Parliament.

Kenya's momentum for change from a controlled economy to a Market Economy was amplified by Sessional Paper No. 1 of 1986 on « Economic Management for Renewed Growth », which noted on page 24 paragraph 2.53 that the « Government will establish the market-based incentives

and regulatory structures that will channel private activity into areas of greatest benefit for all Kenyans. In doing so, Government will rely less on instruments of direct control and increasingly on competitive elements in the economy ». At paragraph 6.31, page 100, the Sessional Paper also noted that, « At present, Kenya has no compressive legislation making restrictive practices illegal and no administrative or legal mechanism to prevent them » . Therefore the « Government will propose legislation prohibiting restrictive trade practices and establishing an administrative mechanism to enforce it. » This commitment by the Government resulted in the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya in December 1988 and the Act was published in Kenya Gazette of Friday, 23rd December 1988 after receiving the Presidential Assent on 19th December 1988. Thereafter, the then Minister for Finance signed the necessary Legal Notice on 30th December 1988 appointing 1st February 1989 as the day on which the Act would come into operation.

3.0 Objectives of Kenya's Competition Law

The principal objective of Kenya's Competition Law is to encourage competition in the domestic market by prohibiting restrictive trade practices, controlling monopolies , regulating concentrations of unwarranted economic power and prices.

The second objective of the Law is to set up the necessary institutional framework for administration and enforcement of Kenya's Competition Law and Policy.

4.0 Institutional Framework

Competition cases in Kenya are handled by five principal institutions. These are Legislature (Parliament), Office of the Minister in-charge of Finance, the Office of the Commissioner for Monopolies and Prices, the Restrictive Trade Practices Tribunal and the High Court of Kenya. Each one of these institutions has its functions, responsibilities and powers clearly spelt out in the legislation.

4.1 Legislature (Parliament)

Parliament is the principal custodian of public interest in Kenya and it creates both the institutional and legislative frameworks for the promotion and protection of public interest. In the competition area, Parliament enacted the current legal instrument, i.e. the Restrictive Trade Practices, Monopolies and Price Control Act, Cap. 504 of the Laws of Kenya. And because the market is dynamic, the Law that regulates the functioning of the market must be reviewed from time to time so as to align it with the dynamic changes in the market place. My submission here is that Parliament has a functional responsibility of ensuring the updating of the country's Competition Law so that the Law is able to support and promote effective competition so as to further the economic interests of the public and the efficiency of business.

4.2 Office of the Minister for Finance

The overall responsibility for competition Policy in Kenya is in the hands of the Minister for Finance. Section (3)(2) of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws o Kenya, subjects the Commissioner for Monopolies and Prices to the control of the Minister and the Commissioner obtains compliance with his professional prescriptions for the market through Ministerial orders. The Minister relies heavily on the professional advice of the Commissioner for Monopolies and Prices who with a team of economists, financial analysts, lawyers and other necessary market analysts is the principal custodian of Kenya's Competition policy. The Commissioner, whose appointment is mandated

under section 3(1) acts as a watchdog, keeping an eye on commerce as a whole, carrying out initial enquiries and ordering in-depth investigations whenever situations demand. The Commissioner has the primary responsibility for conducting investigations into all possible situations of anti-competitive practices such as restrictive trade practices, abuse of dominant market power, mergers and take-overs. In practical terms, such investigations are carried out by the Commissioner's staff in the Monopolies and Prices Commission. The work involves responding to complaints by a company's competitors or customers, and carrying out informal research into markets where competition problems are thought or alleged to be present.

4.3 The Office of the Commissioner of Monopolies and Prices

The Commissioner for Monopolies and Prices is appointed in pursuant to the provisions of Section 3(1) of Kenya's Competition Law and he, in turn, directly and indirectly controls, manages and influences competition in exercise of the powers conferred upon him by the Law and such limitations as the Minister may think fit. The Law does not provide the authority that is responsible for the appointment of the Commissioner for Monopolies and Prices. However, once the Commissioner is appointed he is independent and has a range of statutory duties and responsibilities. He heads the Monopolies and Price Commission Department of the Treasury and has responsibilities for efficient administration and enforcement of the Competition Law. He has also responsibilities in the consumer protection field. He seeks to maximise consumer welfare in the long term, and protect the interests of vulnerable consumer by :-

a) empowering consumers through information and redress.
b) Protecting them by preventing abuse.
c) Promoting competitive and responsible supply.

It must however be understood that the Commissioner has no powers to help individual consumers in their private disputes with traders. However, he may be able to suggest who would be in the best position to help.

4.4. The Restrictive Trade Practices Tribunal (RTPT)

Pursuant to Section 64(1) of the Restrictive Trade Practices, Monopolies & Price Control Act, Cap.504 of the Laws of Kenya, a quasi-judicial authority, that is Restrictive Trade Practices Tribunal, was established on 8th February 1991. The RTPT consists of a Chairman who must be an advocate of the High Court of Kenya and of not less than seven years standing and four members. The members of the RTPT have a five years secure term of office and may be re-appointed for other terms of office at the expiry of the five years.

It must be stressed here that once constituted by the Minister for Finance, the RTPT is absolutely independent of the Office of the Minister and the Office of the Commissioner for Monopolies and Prices. The principal functions of the Tribunal is to arbitrate over competition policy disputes resulting from ministerial orders made on the recommendation of the Commissioner for Monopolies and Prices. The RTPT has powers to overturn, modify, confirm and/or refer back to the Minister orders appealed against by aggrieved parties.

Orders and decisions of the Tribunal are only appealable to the High Court of Kenya and such appeals are only feasible within 30 days following the communication of the Tribunal's decisions/orders to the concerned parties.

4..5 The High Court of Kenya

All appellants to the RTPT in pursuant to the provisions of Sections 20(1),25(1) and 31(1) in respect to ministerial orders made in pursuant to the provisions of Sections 18(1), 24(1) and 31(1) respectively who are dissatisfied with the decisions of the RTPT may appeal to the High Court of Kenya against those decisions within thirty days after the date on which a notice of those decisions was served on him and the decision of the High Court should be final.

It should be noted here that ministerial orders made on determination of maximum prices, prescription of percentage fixed goods and determination of costs under sections 35, 36 and 37 respectively are not appealable to RTPT or High Court. However, these orders must be laid before Parliament as soon as may be possible after they are made, and if a resolution is passed within the next 28 days on which the National Assembly sits next after such order is laid before it that the order be annulled , it shall henceforth be void , but without prejudice to the validity of anything done thereunder, or to the making of any new order.

5.0 Enforcing the Law

Whether through ignorance of the law, or deliberately, any person or business which fails to comply with ministerial orders on restrictive trade practices, abuse of market power or mergers and take-overs, is guilty of an offence under the Act and is liable on conviction to fines and imprisonment with or without corporal punishment or both fine and imprisonment.

The fines may include five times of the overcharge in the case of prices, twice the cost incurred by the aggrieved competitors and Kshs. 100,000.00 for the offence of the abuse of market powers. The imprisonment may range from one year to five years. Penalties may also be a combination of several fines and terms of imprisonment.

Kenya's Competition Policy is heavily over-loaded with objectives which quite often are in conflict with one another, and which would be better served if specifically addressed through separate policy and legal instruments. For instance, protection and promotion of consumer welfare may in the short and medium terms be in conflict with competition objectives and similarly public welfare may be in conflict with private commercial interests in the field of the exploitation of competitive advantage in the market place. Equally, the legislation is complex and distressing to the minds of the administrators and businessmen in the process of its interpretation and implementation.

In this regard, my submission is that there is an urgent need for Kenya to formulate separate policies to address the overlapping policies which are currently addressed by the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya. To start with, the following separate policies and laws may be considered for formulation and enactment :-

a. Fair Trading Policy and Act to address consumerisation and public welfare interests in the economy.

b. Competition Policy and Act to address Economic efficiency issues in the allocation of scarce resources.

c. Monopolies and mergers policy and Act to address gigantism in the market place and the control of the abuse of market power.

d. Restrictive Trade Agreements and practices policy and Act to address formal and informal commercial agreements and arrangements which restrict competition in the market - place.

e. Streamline sectoral policies and Acts which must be subservient to the Fair Trading and Competition Acts.

6.0 Critique of the Law

This Act is basically divided into the following major parts:

1. Provisions relating to restrictive trade practices-these include predatory trade practices, refusal to sell, price discrimination, cartels, collusive tendering and bidding, misuse of IPRs etc.

2. Control of monopolies and concentrations of economic power- this part subsumes mergers and take-overs. Specifically, the Minister is mandated by the law to keep the structure of production and distribution of goods and services under constant review to determine where concentrations of economic power exist whose detrimental impact on the economy out-weighs the efficiency advantages.

3. The establishment and assignation of competition law and policy surveillance and enforcement institutions - the Act establishes the following institutions; [a] The office of Commissioner for Monopolies and Prices, and [b] the Restrictive Trade Practices Tribunal. The Act also assigns statutory functions to the following institutions; [a] the Office of the Minister for Finance as the general overseer of the implementation and enforcement of competition policy and law , and [b] the High Court as the final appellate institution in all matters germane to competition disputes.

The Kenyan Law was transitory in its conceptual underpinnings and was meant to progressively move the country from a Controlled Regime to a liberalised market. Perhaps because it was enacted when liberalisation was not fully embraced, it has many whimsical and anachronistic manifestations which invariably render its enforcement not only indefinitive but also cumbersome. There is also in existence a wide array of other Acts of parliament whose effect, in totality, is to brazenly detract the country from the path of universally accepted competition principles and rules. Like a veritable colossus, they bestride the entire gamut of the nation's economic sectors. These are Sectoral Acts such as the Industrial Property Act, the Trade Licensing Act, the Seeds and Plant Varieties Act which render the enforcement of the law quite difficult. The Monopolies and Prices Commission has in the recent past proposed a review of the law skewed towards the amelioration of these anomalies and to strengthen, harmonise, broaden and rationalise the various activities putatively and actually within the remit of the national competition regime. More specifically, it is intended that the Monopolies and Prices Commission as a Macro-Regulator should be accorded a legal mechanism to enable it relate effectively with sector regulators in all matters spawning competition concerns.

7.0 <u>Handling of cases</u>

Kenya's Monopolies and Prices Commission takes into consideration the following realities of the market – places when interpreting , enforcing and complying with the provisions of the country's Competition Law :

(i) The need to support the good work being undertaken by the Inter-Governmental Group of Experts[IGE] and the Working Group on Interaction Between Trade and Competition Policy [The Working Group].

(ii) The conduct of TNCs, Hard - core Cartels and Cross-Border Mega Mergers .

(iii) The need for Kenya's enterprises to be afforded time and resources to create critical masses which will allow them to Marshall some muscle in the world competition arena.

(iv) Takes into account the diversity of member states both developing and developed, in levels of development, institutional capacities and structures.

(v) Expects future multilateral arrangements in Competition should subsume, and be predicated upon, the principles of diversity, progressivity and flexibility and should not be employed as a way of " clipping the wings" of comparatively stronger firms in the developing countries by well established firms of the developed world.

(vi) Is of the view that in order to come up with appropriate and harmonised policies on both Trade and Competition, there is need for improvement of co-operation at three levels. One, among national competition authorities particularly on information exchange. Two, among governments. Three, between competition agencies and enterprises. This co-operation will promote a harmonised approach to issues such as cross-border mergers, hard-core cartels, dumping, subsidies, differential tariffs etc,. Requisite consultations should be encouraged and a dispute resolution mechanism should be embraced. This co-operation will assure equal treatment for member states.

(vii) Ensures that competition policy considerations are taken into account in the formulation and implementation of trade and other related policies.

By the end of year 2000 , the Monopolies & Prices Commission had handled 257 Competition cases . A sample of cases with international dimension handled in 2000 is summarised hereunder :

I. Acquisition of M/S Agip Kenya Ltd by M/S Shell Kenya Ltd and M/S British Petroleum Kenya Ltd (Shell / BP) .

1.0 Introduction

On 2nd June 2000, M/s Shell/BP and Agip submitted a joint application to the Minister for Finance through the Commissioner for Monopolies and Prices in accordance with the provisions of sections 22, 27 and 28 of the Restrictive Trade Practices, Monopolies and price Control Act, Cap.504 of the Laws of Kenya seeking ministerial authorisation for the acquisition of all business operations of M/s Agip Kenya Ltd. by M/s Shell/BP. The transaction in Kenya had been triggered off by the Sale/Purchase Agreement between the parent companies, M/s Agip Petroli International B.V of Rome, Italy and Shell International Petroleum Company Ltd. of London, United Kingdom (acting on its own behalf and on behalf of M/s British Petroleum AMOCO Plc) of 10th January 2000. In this Agreement, the seller (Agip), contracted with the purchasers (Shell/BP) to sell to the purchasers all equity in its subsidiary companies in five (5) African countries, namely; Kenya, Uganda, Eritrea, Ethiopia and Cote de Voire as a single package.

Under the Kenyan Competition law, mergers and take-overs between two or more independent enterprises engaged in manufacturing or marketing similar goods or services are subject to approval by the minister in charge of Finance in the Government of Kenya.

The transaction between Agip and Shell/BP required the minister's approval for it to have any legal effect.

For the purpose of evaluating the competitive impact of he acquisition in order to be able to formulate a suitable recommendation to the minister, the Commissioner instituted investigations which ended on 4th October 2000 with the publication in the gazette of the minister's conditional approval of the acquisition.

The following is the overview of the investigative activities after the receipt of the application:-

The participating parties were requested to supply copies of the Agreement on the transaction on 2nd June 2000.

The Commissioner formally acknowledged the receipt of the application on 6th June 2000.

The Commission carried out a preliminary desk research to determine whether an in - depth investigation was needed or not, the relevant market, the main trading activities in the petroleum oil industry and the main operators. This report was submitted to the Commissioner and discussed with the case officers on 15th June 2000. It was decided that an in - depth investigation would be carried out.

The participating parties submitted copies of the Letter of Intent on 20th June 2000.

Between 20th and 28th June 2000, the Commission contacted stakeholders in the Petroleum Oil Industry to make appointment for interviews and to request for written presentations regarding the proposed acquisition of Agip by Shell/BP. Those contacted included :- Ministry of Energy, East African Petroleum Institute, Kenya Oil Refineries Ltd, Kenya Pipeline Company Ltd., Association of Independent Petroleum Dealers, five non - participating multinational oil companies (Caltex, Kobil, Kenol, Mobil and Total) and the Kenya National Oil Corporation.

On 21st July 2000, the Commission formally informed the participating parties that interim findings of our investigations had shown that the proposed acquisition of Agip by Shell/BP would result in substantial injury to competition process in the production and supply of liquefied petroleum gas (LPG) and the use of track loading arms for white oils in Mombasa and Nairobi. The Parties were therefore requested to submit proposals on how the Agip LPG and track loading facilities in Nairobi and Mombasa could be restructured after the acquisition so as to minimise the anti-competitive effects of the proposed acquisition in order to safeguard the interests of other market operators and consumers. The parties were also requested to submit a schedule of all durable assets and their market values which were the subject of the proposed acquisition.

Between 21st June and 17th August 2000, case officers travelled throughout Kenya to collect and compile information through interviews with stakeholders in Kenya's Petroleum Oil Industry and formal and informal presentations from interested groups. Case officers also held several meetings in Monopolies and Prices Commission offices with stakeholders.

Between 18th and 21st August 2000, the case officers wrote their report and submitted the same to the Commissioner on 21st August 2000.

On 29th August 2000, the Commissioner submitted his recommendations to the minister for Finance who after considering the Commissioner's recommendations approved the acquisition on 20th September 2000 subject to disposal of LPG and loading arms facilities within one year following the acquisition. The ministerial authorisation was published in the gazette on 4th October 2000.

It should be noted that Shell/BP appealed to the minister to authorised the acquisition unconditionally but their appeal was rejected by the minister.

II . Take-over of Eight(8) Coca Cola Plants by M/s Coca Cola South Africa Bottling Company Pty (Coca Cola SABCO)

1.0 Introduction

Kenya had in year 2000 ten(10) Carbonated Soft Drinks bottling plants. Eight(8) of the plants bottle Coca Cola branded soft drinks; one(1) bottles Softa and the tenth bottles Schweppes branded soft drinks.

Prior 1995, Coca Cola, Pepsi Cola and Schweppes competed for a share of the Kenyan carbonated soft drinks market. By the end of 1995, the dominant Coca Cola branded carbonated soft drinks which controlled about 95% of the national market locked out all competition with the closure of Schweppes and Pepsi Cola plants. To strengthen and sustain its dominance in the market, it appears that Coca International decided to take - over all the eight Coca Cola bottling plants in Kenya through its subsidiary company, Coca Cola SABCO in 1995 in order to take direct control of production, marketing and supply of inputs in all the eight Coca Cola plants in Kenya. This was planned to be done systematically by the acquisition of one by one of all the eight plants by Coca Cola SABCO.

2.0 Investigations

Towards the end of September 1997, M/s Coca Cola SABCO with the support of M/s Coca Cola Africa submitted an application for the acquisition of M/s Flamingo Bottlers of Nakuru. Investigations revealed that M/s Coca Cola SABCO had already acquired Nairobi Bottlers (the most important Coca Cola plant in the country) in suspicious circumstances in 1995. The acquisition had been effected without the approval of the minister for Finance.

To deal with the application for the acquisition of Flamingo Bottlers, a large number of stakeholders in the soft drinks sector including Government agencies, consumers, traders, potential competitors, trade associations and the applicants were interviewed by Competition Policy officials in October and November 1997. At the end of the investigations, the minister approved the application subject to certain conditions on 3rd December 1997.

Investigations into the structure, conduct and performance of Kenya's carbonated soft drinks sector have been and still are on going in response to appeals from Coca Cola SABCO for the Commission to reconsider the conditionalities imposed on the company in 1997. The last appeal was received in 2000 at a time when the Commission was investigating several complaints against the practices and conduct of M/s Coca Cola SABCO and the appeal was rejected.

III . The sale of National Social Security Fund (N.S.S.F) shares in East African Portland Cement Company Ltd. (E.A.P.C.C) and Athi River Mining Company Ltd. (A.R.M) to Blue Circle Industries Plc (B.C.I) of United Kingdom.

1.0 Introduction

Kenya has three cement manufacturing companies which are all quoted in the Nairobi Stock Exchange (NSE). M/s Bamburi Cement Ltd. has a capacity of 1.2 million tonnes annually and sells about 600,000 tonnes in Kenya annually (50% of the annual domestic consumption). M/s E.A.P.C.C has a production capacity of 800,000 tones annually and sells about 500,000 tones annually (about 40% of the annual consumption). M/s ARM has a production capacity of 100,000 tonnes annually and caters for about 10% of the annual domestic consumption.

2.0 Application

In June 2000, M/s Blue Circle Industries Plc (B.C.I) applied for authorisation to acquire 9,300,000 and 870,000 N.S.S.F shares in E.A.P.C.C and A.R.M respectively. N.S.S.F which is a public pension fund had agreed to sell the stock and B.C.I had agreed to purchase the same.

3.0 Investigations

Investigations revealed that M/s B.C.I of United Kingdom and M/s La Farge of France owned directly and indirectly through their International Holding Company, M/s Bamcem, 73%, 42% and 19% of the shareholding in Bamburi Cement Ltd, E.A.P.C.C and A.R.M respectively. The proposed transaction would result in M/s Bamcem, which is owned by M/s B.C.I, La Farge and Costal of Switzerland 40%, 40% and 20% respectively and its principals owning 72%, 52% 21% in Bamburi Cement Ltd, E.A.P.C.C and ARM respectively. The implication is that M/s Bamcem and its principals, B.C.I and La Farge would have substantial influence in decision making and corporate policies of all three cement manufacturing companies in Kenya if B.C.I were authorised to acquire 9,300,000 and 870,000 shares in E.A.P.C.C and ARM respectively.

4.0 Decision

As the proposed transaction would enhance the dominance of M/s B.C.I in the production and marketing of cement in Kenya with potential injury to potential competitors and consumers of cement, it was decided that the transaction would reduce competitive benefits in the production and supply of cement. The application was therefore rejected by the minister for Finance.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

21-Sep-2001

English text only

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP/WD(2001)3
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OECD Global Forum on Competition

CONTRIBUTION FROM LATVIA

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COMPETITION LAW AND POLICY IN LATVIA

Competition policy in Latvia is regulated by the Competition Law, which came into force on January 1, 1998 and by the several Cabinet Regulations. Anti-monopoly Committee was reorganised and Competition Council and Competition Bureau came in its place and took over its rights and liabilities. The Competition Council is the decision-making authority, which consists of five members and are nominated by the government for five-year period. The Competition Bureau constitutes the executive authority, which carries out investigations and prepares draft Council decisions and control their executions. There are 35 staff working in the Bureau.

The objective of Competition Law is to ensure the opportunity for each market participant to undertake economic activity under the conditions of free and fair competition and favourable conditions for the protection, maintenance and development of competition in the public's interest, by restricting market concentration, terminating activities which are prohibited by the regulatory enactments regulating competition, and by bringing responsible persons to liability within the procedures prescribed by normative acts.

The enforcement of the Competition Law is controlled by the Competition Council. Formally it reports to the Ministry of Economy, but the ministry doesn't have the power to influence the case investigations and the decisions taken by the Council.

The Competition Law applies to market participants and to any form of registered and unregistered associations of market participants, to natural and state monopolies, as well as to other enterprises which are in a monopoly position.

Agreements (contracts, co-ordinated actions and decisions by unions of undertakings) aimed to or whose consequences may restrict, preclude and deform competition are prohibited by the Competition Law. The Law also prohibits abuse of dominant position. Task of the Competition Council set by the Law is to supervise merger procedure through reviewing of notifications and permitting or prohibiting merger according to its further possible influence on market. The Law contains also prohibition clauses of unfair competition.

The Competition Law in Latvia is enforced by Cabinet Regulations setting out procedure of reviewing violation, procedure of notification of agreements and mergers and several exemptions from the prohibition of agreements, and they are as follows:

- exclusive distribution agreements and exclusive purchasing agreements;
- specialisation agreements;
- franchise agreements;
- joint research and development agreements;
- patent and know-how licensing agreements;
- motor vehicle distribution agreements;
- insurance agreements;
- air transport agreements;
- liner shipping (consortia) agreements.

To facilitate implementation of Cabinet Regulations the Competition Council has approved and published methodical guidelines on how to compile notifications of agreements and mergers.

Competition Council acts in accordance with the Competition Law. The Council performs control and supervision of market exercising its legal rights, in order to ensure free and fair competition among the market participants, prevent abuse of dominant (monopoly) position and restrictive agreements, control merger processes. In 2000 Competition Council investigated 32 cases. Eleven of them linked with abuse of dominant position, 6- restrictive agreements, 3 - mergers, 12 - unfair competition.

Most of violations related to submission received were in such markets as food processing, beverages, medicine and other consumer goods, oil and fuel, water supply and heating, mass media, airport and seaport services.

Parallel the investigation Competition Council extended review of possible risk-affected markets. For example, currently, broad review of milk market is initiated in order to determine whether the agreement on specialisation should be considered as prohibited agreement whose aim or consequences may deform competition. Markets of vehicle distribution and IP telephony services are under review as well.

During the last year Competition Council took a part in the preparation and evaluation of draft legislative acts of another state authorities before their reviewing by the government. They were evaluated in connection with competition protection and development problems, so providing the maintaining of these principles in the legislative processes as well.

1. Pharmaceutical services market.

In 2001 the Competition Council examined two draft Cabinet Regulations for regulation of pharmacies opening, functioning and placement. The Competition Council objected against determination number and placement of pharmacies, what restricts freedom of entrepreneurship and competition development in distribution of medicine and pharmaceutical products. The Council directed draft authors attention on consequences, that with reduction by legislative restrictions number of market members and offering of medicine and pharmaceutical products, obstacles will be created to free competition between pharmacies, as well as possibilities of consumer choice will be limited. Moreover, in some settlements it can create monopoly of one pharmacy. It can result in holding prices of medicine in the highest permitted level of pharmacy prices. The Competition Council objected also against obligatory demand to create regular clients registers in pharmacies, what *de facto* will stimulate market sharing.

2. Agricultural products market.

The Competition Council objected against planned order of market intervention in grains market, pointing out, that measures of state intervention would be managed in manner to prevent farmers in situation, when offer of grains exceeds the demand (seasonal surplus of grains), and purchase price is reduced under the state intervention price.
After examination of draft "Regulation on securing prices and tariffs parity for production and services of agricultural products and products used in agriculture", the Competition Council indicated, that, by defining certain consumption of production factors for certain amount of agricultural production, the growth of production efficiency is not stimulated. Thus, changes of agricultural production prices are not proportional to changes of resources prices on the ground of competition pressure, kept by market participants, what will provide more effective operation of resources for production of agricultural products.

3. Passenger traffic services market.

After examination of draft Regulation "Order of arriving and parking busses in buss-stations", the Competition Council directed attention of draft authors on fact, that buss-stations are in dominant position in their areas, therefore conditions of Regulation must be precise and clear, to preclude

buss-stations from abusing their position, violating thus the provisions of the Competition Law. Notes of the same character was represented also on the draft Regulation, specifying arrangement and executing of international passenger traffic. The Council pointed out in addition, that the provision of the draft regulation is not acceptable, determining the order that actual transporters evaluate a potential competitor, influencing thus his entering the market.

4. Energy market.

In connection with amendments of the Energy Law, examined by the Saeima (Parliament) and the profound investigation of energy supply market, provided by the Competition Council, it addressed proposals to the responsible commission of Saeima and summoned it to re-examine provisions of the draft, allowing actions, addressed against competition, containing contradictious provisions, are in contradiction with European Energy Charter Treaty. It contains also administrative barriers for competition development in economical activities of energy sector.

Having regard to the two-year experience of application of the Competition Law and recommendations by the experts amendments to the Competition Law (new Competition Law) have been drafted. The new Law was adopted by the Saeima (parliament) in Second Reading on May 10, 2001. The essence of the amendments concerns merger control and surveillance. Amendments will restrict number of uncontrolled processes of merger as well as high concentration resulted thereof. Moreover, the draft law contains:

- perfection of several definitions, in order to apply terms of the law properly and meet other regulatory enactments in force. For instance: dominant position, joint dominance;
- specification of status of the Competition Council, in order to eliminate imperfections of the current law and incorporate the Council into the government system as well as responsibilities of the decision making body and the investigation body are clarified;
- amendments to fining system where application and calculation procedure is perfected;
- editorial amendments, in order to ease-up application of the law for undertakings and governmental institutions, and the court.

The adopted draft law (new Competition Law), overall, will provide more favourable conditions for entrepreneurship and investment. After the law will be adopted (planned to adopt by the autumn of the 2001), it is planned to issue Cabinet Regulations where the application procedure is specified.

Competition rights are new sphere in Latvia, and the practice of application of the Competition Law is under development now. Because it the Council executes the consultative function as well. Under year 2000 officials of the Council furnished 130 consultations and explanations to undertakings, associations of branches, legal offices and natural persons on application of specific legal norms. Information was published (totally 30 publications) on cases under investigation and decisions adopted by the Competition Council as well as information on agreements and mergers of market participants.

To upgrade the level of knowledge on the promotion of competition in Latvia, experts of the Competition Council performed lectures and workshops for law students and entrepreneurs in different higher education establishments - totally 54 classes. 13 students received consultations and information necessary for their studies and scientific research by the Competition Council.

Competition Council has received many applications with complaints on possible violations of the Competition Law. Such applications were received from natural persons, enterprises and state offices. In many cases Competition Council did not find justification to initiate investigation case. Although, a justified answer has been always issued to applicant, with message on motivation, why the application was rejected.

There is a remarkable proportion of young (from 20 - 30 years old) employees - 47 % of all employees. It is necessary to notice, that average age of females employed under year 2000 was 35 years, males - 37 years, but average age of senior staff - 36 years.

The education level of personnel is characterised by following data - 24 from 34 employees or 71 % have higher education (incl.7 employees with Master degree), 6 % have secondary school or secondary vocational education. In addition, 17 employees of the Council perfected their knowledge in spheres, connected to their professional duties, they attended seminars arranged by different universities or ministries. Experts of the Competition Council participated in 9 seminars, meetings and conferences organised abroad, where actual competition problems were discussed and the newest information exchange took place.

DESCRIPTION OF CASES

Prohibited agreement in the market of international courier services
Postal Agency Agreement between Latvia Post and DHL International (Latvia).

The facts and legal framework.

Mass media spread information that starting with 01.10.1999. the agreement on co-operation in the provision of international courier services between state-owned joint stock company Latvia Post (hereinafter referred as to - Post) and DHL International (Latvia) Ltd. (hereinafter referred as to - DHL) will come into force.

Competition Bureau requested the Post to submit the mentioned agreement for examination. The Postal Agency Agreement (hereinafter referred as to - Agreement appointed Post as DHL's agent and enabled DHL to sell its services through the post departments in the whole territory of Latvia. Agreement provided that starting from 01.10.1999. Post would stop the provision of EMS international courier services except to Estonia, Lithuania and Finland. Besides the Agreement contained exclusive obligations - Article 4.4. provided: *"Post will not be involved either directly or indirectly in the sale of any third party Services which compete with the Services, unless expressly agreed otherwise by DHL"*. According to the Agreement *"services means the services of cross - border express transportation of documents, parcels, as offered by Post in the name and on behalf of DHL"*. The Competition Council adopted the decision to start the investigation on possible violation of Article 15 of the Law on Competition. The Article 15 provides: "*The following agreements between market participants which have their object or effect the prevention, restriction or distortion of competition shall be prohibited and considered null and void (...)"*.

Market analysis

Relevant market identified in this case is outgoing international express courier services provided within a global, centralised network in the Republic of Latvia. The market is characterised by several global players - DHL International (Latvia), EKL/LPS (provides UPS services), TNT Latvia, Baltijas Express serviss (provides FedEx services). Market share of DHL in the relevant market in 1999 was 58,5%. Market analysis proved that DHL did not possess a dominant position in the relevant market. According to the article 1.2. of the Law on Competition dominant position is *"the exceptional economic position of a market participant in the relevant market if its market share in the relevant market exceeds 40% and if it has the possibility to significantly prevent, restrict or distort competition in the relevant market by acting fully or partially independently from the competitors, customers and purchasers"*.

Despite of DHL's large market share there is effective competition in the relevant market, supply and demand as well as competition in the relevant market are growing gradually, new market participants are entering the market. Thereby at this moment DHL does not enjoy such level of independence from the competitors and customers to be able to prevent, restrict or distort the competition.

Express Mail Services (EMS) provided by Post were included in a separate market because these services are provided on the basis of co-operation between postal administrations. They differ from the courier services provided within the global network due to the different amount of extra services, quality, delivery time, prices, target customers and intended use. Both groups of services are considered to be only partially substitutable therefore they are divided in separate, nevertheless closely located markets of international courier services.

Competition concerns

Competition Council considered that termination of the EMS services could not be regarded as a prohibited restriction of services and market concentration. EMS services received lot of complaints of customers because of the unsatisfactory quality that was caused by lack of effective co-operation with the post administrations of other countries. Moreover there are also global trends to substitute EMS services with the services provided within the global, centralised network (for example, DHL, TNT). National post administrations have started to transfer their international express delivery services to globally acting companies instead of selling their own EMS services due to the fact that EMS business cannot ensure the same level of reliability as private operators, since it is based on co-operation between participating postal administrations and lacks centralised control.

After the examination of the Agreement and evaluation of information submitted by contracting parties and obtained from third parties, Competition Bureau submitted to the parties the Statement of objections explaining that Article 4.4. of the Agreement restricts the actual and potential competition in the relevant market and therefore infringes Article 15 of the Law on Competition.

The Competition Council stated that competition concerns arise due to the following reasons:

1. Restricted access of the competitors of DHL to the Post's infrastructure

Post, by virtue of the exclusive rights granted to him, is the only operator controlling a public postal network which covers the whole territory of Latvia. It has a significant advantage of being regarded by the users as the principal postal enterprise, because it is the most conspicuous one and is therefore the natural first choice. Duplication of this infrastructure is not realistic alternative, it can be regarded as unique. This means that post infrastructure can be perceived as essential element of competitiveness towards some groups of customers. Article 4.4. of the Agreement gives to DHL exclusive rights to use the chain of Post offices for sale of DHL services and restrict the possibilities of competitors to use Post infrastructure for sales of competitive services, therefore the actual and the potential competition in the relevant market is restricted.

2. More favourable competitive conditions for DHL are created

Due to the importance of the Post infrastructure, access to 46 post departments in the whole territory of Latvia will guarantee wide supply of DHL services in Latvia and will provide DHL with the segment of customers which would only have been available to other private operators through establishing a separate network with considerably bigger costs as those of DHL using Post as an agent, and which would have given DHL a significant advantage over its competitors. As a result DHL would have more favourable competitive conditions if compared with competitors in a non - restricted, long term period.

DHL market share in the relevant market in 1999 was 58,5% which together with the access to the Post's infrastructure can be regarded as significant factor for creation of a market power in the relevant market and might lead to a dominant position over time. Considering the fact that the market of international courier services is growing, the mentioned factors will negatively influence the potential competition in the relevant market in the future.

3. Restriction of the Post's freedom to carry out independent economic activities

According to the Article 4.4. Post has no rights to conclude the same or similar agreements or in any other form to participate in sales of the services competing with DHL services without DHL acceptance. This restricts the Post's freedom to take independent economic decisions concerning the co-operation with third parties. Therefore the contract terms do not allow economic activities where they are allowed by legislation. Moreover they can not be considered as indispensable for the attainment of the objectives of the Agreement.

Conclusion

After receiving the Statement of objections both parties showed their interest in resolving the matter and amended the Agreement by signing the Annex No1 which provided the exclusion of Article 4.4. out of the Agreement.

The Competition Council adopted the following decision:

1) to establish that contracting parties have infringed the Article 15 of the Law on Competition;
2) to impose on the parties an obligation to inform the Competition Council about any amendments and supplements to the Agreement and Annex No 1 which can be considered as possible violation of the Article 15 of the Law on Competition as well as about any other similar agreements which could replace the Agreement;
3) to terminate the case because the violation has been eliminated.

Prohibited Agreement in the Aviation Services Market

Commercial Agreement Between Airlines "Air Baltic Corporation", Latvia and "Transaero", Russia

Mass media announced that on August 1, 1998 two airlines, which operate regular international flights to/from Republic of Latvia – the International Airport "Riga", concluded a Commercial Agreement (referred hereinafter as to Agreement) on co-operation in organisation of flights between Riga and Moscow and on August 26 the flights were started. From the Latvian side flights were provided by Joint stock company "Air Baltic Corporation" (referred hereinafter as to Airbaltic) and from the Russian side – by "Transaero Airlines", Russia, (referred hereinafter as to Transaero). Because of this Agreement airline RIAIR (referred hereinafter as to RIAIR), which was a partner of airline Transaero, ceased their flights on the mentioned route.

Competition Council requested to submit the Agreement to assess the Agreement and clarify the circumstances.

Because RIAR indebted to Transaero for the plane hire, Transaero cancelled the contract with RIAIR on plain hiring. Airline RIAIR ceased its operations and was forced out of the market.

Throughout the time period when the Agreement was effective Airbaltic had an associated enterprise - airline SAS, Scandinavia, which also operates flights to/from Latvia; while Transaero had an associated enterprise - airline RIAIR, Latvia, which hired a plane from the Transaero and, until the

Agreement came into effect on October 25, 1998, it operated regular flights on three routes, including Riga – Moscow.

In year 1998 the Airbaltic was the biggest carrier of regular international flights to/from Latvia. In respect to the total amount of passengers Airbaltic market share was 32%, it was followed by airlines SAS (11%), RIAIR (7%) and Transaero (3%).

The relevant market was defined as a market of passenger transportation services to/from Republic of Latvia. Also, on the route Riga – Moscow operates airline "Aeroflot", which competes with airlines Airbaltic and Transaero.

The Agreement provided that during the term of Agreement no party of the Agreement shall directly or indirectly, itself or through associated persons operate regular flights between Latvia and Russia, except for the flights provided in the Agreement. The term of Agreement was 10 years. The restrictions were bounding not only to the parties, but also to their associated enterprises. Thus it provided that neither airlines Transaero nor Airbaltic, nor their associates - airlines SAS and RIAIR should operate regular flights between Riga and Moscow, as well as on any route connecting Latvia and Russia.

In addition the Agreement provided that Airbaltic should pay certain guarantee payments on condition that Transaero fulfils Agreement not to compete directly or indirectly with Airbaltic (i.e. that the Transaero should not compete neither itself nor through companies of which the Transaero itself or its shareholders are participants) by offering regular air transportation to/from Latvia and inside Latvia.

Thus it was planned to restrict competition in a wider geographic market than the route Riga – Moscow and for several market players.

Airline Transaero is an airline of Russian Federation, which does not practice entrepreneurial activities in Latvia. Therefore, the Competition Council was able to investigate one Party of the Agreement - Airbaltic.

Having regard to the procedure of investigation of violations of Competition Law the Competition Council ascertained the opinion of Airbaltic concerning the possible violation. It was told to the Competition Council that inclusion of various conditions in the Agreement reflects the international practice of civil aviation. As far as the international agreement was not ratified the inclusion of such norms into commercial agreement was necessary to create clearly controlled environment for co-operation. The condition of the Agreement that the carriers designated by the states shall co-operate only with one another were considered a standard condition to be included in the Agreement because an international agreement, in which such condition were stipulated, was not ratified.

Negotiations carried out by Competition Council aimed at termination of violation of the Competition Law led to no positive results.

Competition Council stated that the conditions of the Agreement concluded between airlines Airbaltic and Transaero were aimed to restrict competition in the market of regular international passenger flights to/from Latvia and thereby violates the prohibition laid down in the Article 15 of the Competition Law,.

Article 15 of the Competition Law determines that agreements between market participants, which have their object or effect the prevention, restriction or distortion of competition, shall be prohibited and considered null and void.

The Parties co-operated for approximately one year, the Agreement was interrupted on October 11, 1998. Since in the period when the Agreement was effective the conditions were observed including those restricting competition, i.e. parties and their associates did not compete and did not plan to do so in

the following 10 years, on December 24, 1999 Competition Council decided to impose a fine Airbaltic in amount of 0.7% of the Airbaltic turnover 1998. When deciding on the fine Competition Council took in consideration the seriousness and duration of the violation.

Decision of the Competition Council on imposing of fine was appealed to the Court by the Airbaltic .

On Merger of the stock company "Staburadze" and the "NTBDC L" ltd., and the stock company "Laima"

At the beginning of the 2001 the Competition Council recognised the deal concluded by the stock company "*Staburadze*" (referred hereinafter as to *Staburadze*) and the *NTBDC L* (referred hereinafter as to *NTBDC L*) where *Staburadze* acquired decisive influence on the stock company *Laima* (referred hereinafter as to *Laima*) shall be considered as merger pursuant to Article 19 Part 1 Section 3 of the Competition Law. Therefore, the *Staburadze* shall notify the merger to the Competition Council for evaluation of its effects to competition.

Having regard to the information collected, Competition Council recognised following markets where merging undertakings participants act:

1) Chocolate and chocolate products manufacturing and sale markets in Latvia;
2) Sugary confectionery manufacturing and sale markets in Latvia;
3) Breadstuff confectionery manufacturing and sale markets in Latvia.

The market directly affected by the merger and where merger participants compete was defined as market of sale of caramels and dragee in Republic of Latvia.

Defining the relevant market Competition Council considered following factors:

1) Similarity of goods (size, weight, package);
2) Price of the production, significantly varying among groups of products;
3) Information disposed, that one of the merger participants, *Laima*, applied simultaneous price fixation strategy to both caramels and dragee, thereby reacting to increasing competition in the market;
4) Differences among groups of consumers. According to the disposable market researches, consumers of caramels and dragee differ (age, income level, education, occupation) from those consuming, for example, chocolate;
5) Differences in end-consumption. Each of the groups of products has its own usage traditions, making the substitution almost impossible. For example: substitution of caramels with waffle cake or chocolate;
6) Analysis of information provided by merger participants and their competitors appoints that in each of the mentioned product groups, there are various undertaking performing sale and production;
7) Participants of the merger indicated such relevant markets;
8) Relevantly different raw material is used for production of mentioned groups of products.

Merger of *Staburadze* and *NTBDC L* and *Laima* was evaluated having regard to the development and preservation of competition in the relevant market.

Economic and financial position of merger participants, the relevant market entry barriers and tendencies of demand and supply, and possible benefits or losses for consumers and society as well as other factors were evaluated. During the evaluation information was collected from several market participants: competitors of merger participants and purchaser. The view of raw material suppliers on the merger was identified.

Under the evaluation was established that one of merger participants, i.e. stock company *Laima's* share in relevant market was limited from (…) per cent in 1998 down to (…) per cent in year 2000. Furthermore, the merger will not result in important increase of concentration in Latvian caramels and dragees sales market, because market share of one merger participant in Latvian caramels and dragees sales market is only 4 per cent of the relevant market.

The Competition Council has drawn a conclusion that notified merger will raise competitiveness of market participants in local as well as in international market, by using well known trade marks, united system for advertising, marketing, management and raw material purchasing, as well as other profits of united undertaking. This above mentioned merger would stimulate increasing amount of production export. Furthermore, making evaluation of situation in relevant market and connected markets, Competition Council did not find any circumstances allowing market participants to increase production prices by relevant amount or to decrease amounts of production making worse for consumers after the merger.

Under the merger evaluation process other market participants were inquired - those who considered the merger in direct way will not increase market power of merged undertakings in Latvian caramels and dragees sales market, because every undertaking is the leader in producing and sales its own confectionery category.

In connection with notified merger, negative consequences were established as well, related to decreasing of number of employees, to possible assortment reducing of merger participants as well as to joint undertaking's united market power possible growth in confectionery production and sales sphere.

Although, according the understanding of competition surveillance system, benefits connected with the relevant merger, related to economical situation of relevant market as well as to advantages related to customers' welfare, those benefits must be balanced with prevention, distortion or restriction of competition, occurred as a result of above-mentioned merger. Competition Council has not recognised any relevant competition distorting effects occurred in result of merger of stock company *Staburadze, NTBDC L* and *Laima*.

Thus, evaluating the benefits gained by market participants, involved in the specified case, and by state economy, the Competition Council has drawn a conclusion that in case of declared merger, possible benefits to merger participants and to state economy exceed possible dangerous effects for competition and common economic situation, resulted from the merger.

Taking into account above mentioned the Competition Council decided:

- To allow the merger of stock company *Staburadze, NTBDC L* and *Laima*.

About the Application of "Narvesen Baltija"

The Competition Council on October 20, 2000 received an application from limited liability company "Narvesen Baltija", stock company "Preses Apvienîba" and two natural persons - stock holders of stock company "Preses Apvienîba", where applicants informed that above named natural persons sell their shares of stock company "Preses Apvienîba" to limited liability company "Narvesen Baltija". 85 per cent of total amount of shares were sold.

During evaluation of above mentioned transaction Competition Council considered it as merger of undertakings pursuant the understanding* of provisions of Article 19 the Competition Law of the Republic of Latvia, because in the result of above mentioned transaction limited liability company "Narvesen Baltija" obtains constant or temporary dominant position over stock company "Preses Apvienîba".

The Competition Law of the Republic of Latvia provides that merger participants must submit a notification of merger if two criteria are executed:

1) the combined turnover of the participants during the previous financial year was least Ls 25 million, and
2) at least one of the merger participants was in a dominant position in the relevant prior to the merger.

Stock company "Preses Apvienîba" is an undertaking working with newspapers and periodicals wholesale and retail distribution as one of main activities. In its turn limited liability company "Narvesen Baltija" has newspapers and periodicals retail distribution as one of its businesses. Merger participants mentioned in their application that stock company "Preses Apvienîba" has dominant position in newspapers and periodicals wholesale and retail distribution markets. Besides, according information submitted by applicants, total turnover of both undertakings under previous year did not come to 25 million lats.

Competition Council requested additional information about undertakings affiliated to limited liability company "Narvesen Baltija" and stock company "Preses Apvienîba" to determine whose of affiliated to them undertakings may create together with each merger participant a single market participant. At the same time Competition Council provided market research with aim to test information submitted by applicants and to determine relevant markets, market shares of merger participants and possible effects of planned merger for competition.

Because statistics about newspapers and periodicals sales in Latvia about year 2000 were not acquired and processed, Competition Council requested this information from a number of market participants. With this aim servants of Competition Council visited 8 participants of relevant market (publishers, wholesalers, retail sellers) Latvian Association of Press Publishers and contacted several publishers of newspapers and periodicals in rural areas. Under research was established that wholesale and retail markets of newspapers and periodicals distribution are two different relevant markets. More than 20 undertakings participate in newspapers and periodicals wholesale distribution, the biggest of them are stock company "Preses Apvienîba", "Preses Aìentûra "Santa"", limited liability company "Preses Apgâds", limited liability company "Preses Serviss" and others. The largest companies in newspapers and periodicals retail distribution are stock company "Preses Apvienîba", limited liability company "Plus Punkts", limited liability company "Andrejs & K" and others.

Under estimation of obtained information Competition Council established that stock company "Preses Apvienîba" has dominant position in both relevant markets. Furthermore, information obtained

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* The first paragraph of Article 19 of Competition Law provides that:

A merger of enterprises is:

1) the joining of two or more independent market participants in order become one market participant;
2) the accession of one market participant to another market participant;
3) such a situation in which one or more legal or physical persons acquire, temporarily or permanently, decisive influence over other market participants.

during research activities, gives evidence that stock company “Preses Apvienîba” has possibility to conclude purchasing-selling agreements on more favourable conditions.

Testing the possible effects of merger, Competition Council drew a conclusion that market power of merged undertaking will strengthen, what can drive to restriction, distortion or prevention of competition. Market power and great financial resources of merged undertaking can create possibility in future to control newspapers and periodicals distribution. Besides, Competition Council drew a conclusion that in rural areas of Latvia main market participants are stock company “Preses Apvienîba”, non-profit organisation - state stock company “Latvijas Pasts” and some small newspapers and periodicals distributors, who purchase newspapers and periodicals from “Preses Apvienîba”. Thus merged undertaking has opportunity to control situation in relevant markets of Latvian rural areas. Evaluating situation in capital city, Competition Council drew a conclusion that in connection with increasing of network of supermarkets in the city, the role of news-stands as places for newspapers and periodicals purchasing will decrease.

Evaluating information about undertakings affiliated to merger participants Competition Council drew a conclusion that in turnover of merger participants must be included only turnover of stock company “Preses Apvienîba” and limited liability company “Narvesen Baltija”, what in total made less than 25 million lats.

The Competition Law of the Republic of Latvia provides that merger participants must submit a notification of merger if their combined turnover is more than 25 million lats. Taking into account that the mentioned criteria is not realised, Competition Council stated that merger participants do not have obligation to notify the merger. But, taking into account possibility of negative effects for competition in relevant markets after merger of stock company “Preses Apvienîba” and limited liability company “Narvesen Baltija” Competition Council will continue a surveillance over activities of merged undertaking.

Answers to the Questionnaire on Anti - Cartel Actions.

1. Prohibited agreement in the aviation services market. Commercial Agreement between airlines Airbaltic and Transaero.

a) Article 15 of the Competition Law determines that "agreements between market participants, which have their object or effect the prevention, restriction or distortion of competition, shall be prohibited and considered null and void,". The Joint stock company "Air Baltic Corporation" (referred hereinafter as to Airbaltic), Latvia operates regular passenger flights to/from Latvia, including flights between Riga and Moscow. The Transaero Airlines, Russia, operates regular passenger flights between Riga and Moscow. On August 1, 1998 these two airlines concluded a Commercial Agreement (referred hereinafter as to Agreement) on co-operation in organisation of passenger flights between Riga and Moscow and on August 26 the flights were started. Co-operation between the parties of the Agreement lasted nearly one year. Co-operation was stopped on October 11, 1999.

At the moment when the Agreement was concluded Airbaltic had an associated enterprise - airline SAS, Scandinavia, which also operates flights to/from Latvia; airline Transaero had an associated enterprise - airline RIAIR, Latvia, which hired a plane from the Transaero and until the Agreement came into effect on October 25, 1998 it operated regular flights on routes Riga – London, Riga – Paris, and Riga – Moscow. RIAIR co-operated with Transaero on the route Riga – Moscow. Because RIAR indebted to Transaero for the plane hire, Transaero terminated the contract with RIAIR and the latter was forced out of the market.

b) The Agreement contained direct evidence of a possible violation of the Competition Law. The Agreement provided that during the term of Agreement no party of the Agreement shall directly or indirectly, itself or through associated persons operate regular flights between Latvia and Russia, except for the flights provided in the Agreement. The term of Agreement was 10 years. The restrictions were binding not only to the parties, but also to their associated enterprises. Thus the Agreement provided that neither airlines Transaero nor Airbaltic, nor their associates - airlines SAS and RIAIR should operate regular flights between Riga and Moscow, as well as on any route connecting Latvia and Russia. In addition the Agreement provided that Airbaltic should pay certain guarantee payments on condition that Transaero keeps to the Agreement not to compete directly or indirectly with Airbaltic (i.e. that the Transaero should not compete neither itself nor through companies of which the Transaero itself or its shareholders are participants) by offering regular air transportation to/from Latvia and inside Latvia. Thus it was planned to restrict competition in a wider geographic market than the route Riga – Moscow and for several market players.
Competition Council stated that the concluded Agreement was an agreement aimed to restrict competition in the market of regular international passenger flights to/from Latvia and therefore it violates the prohibition laid down in Article 15 of the Competition Law,.

c) As it was mentioned the Agreement term was 10 years and it was intended to restrict competition in wider geographic market and with several market participants. The Agreement was in force for less than a year and the Competition Council considered the influence of the Agreement as minor.

d) The Competition Council imposed a fine on one Party of the Agreement - Airbaltic for 0,7% of the company's turnover 1998. If the Competition Council determines a violation of prohibition of Article 15 Part 1 of the Competition Law, then having regard to Article 16 Part 2 of the Competition Law, the Council had the right to impose fine to be paid by the respective market participant to the state budget up to 5% of participant's last year turnover. As far as Competition Council decisions are binding to market participants, who have business undertakings in Latvia, the Competition Council was empowered to fine only the Airbaltic. On February 2, 1999

Transaero was registered in Register of Enterprises as a representative office without rights of entrepreneurial activities. Regulations of the Cabinet of the Ministers of 30 December, 1997 No 444 "Procedure of Trial of Breaches of the Competition Law" provides that the Competition Council, when deciding on imposition of fines, shall regard the seriousness and the duration of the violation.
In accordance with the above regulation the time period, when the Agreement concluded on August 1, 1998 by Airbaltic and Transaero, was effective i.e. from August 1, 1998 to October 11, 1999 has to be considered the duration of the violation. In the market of international passenger transportation services such duration is considered as a short period of time. When assessing the seriousness of the violation, the Council considered the nature of violation, market shares and turnovers of the involved market participants, consequences of the violation and the role of each participant involved in the violation. The Competition Council considered violation of the prohibition of Article 15 Part 1 of Competition Law committed by the competitors as a serious violation of Competition law.

2. a) In letter to Competition Council the Airbaltic pointed out that co-operation with airline Transaero resulted in benefits for consumers, because airline Aeroflot, which operates passenger flights between Riga and Moscow, reduced price by 4%. Observations of the relevant market, showed that the price reduction temporary – approximately for 3 months; later on the prices of all service providers were levelled.

   b) As already said the activities of parties of the Agreement temporary – for approximately one year. In aviation services market it is too short a period to estimate real losses (financial, material) inflicted on the other market players or benefits gained by the participants of violation. In this case indirect effect on competition may be considered as well as implicit benefits gained by the violators avoiding competition. The negative consequences for competition could be serious if the planned in the Agreement 10 year term would materialise.

   c) Competition Council received opinion of Airbaltic on the violation of Competition Law: inclusion of non - compete conditions in the Agreement reflects the international practice of civil aviation. As far as the international agreement was not ratified the inclusion of such norms into commercial agreement was necessary to create clearly controlled environment for co-operation. The condition of the Agreement that the carriers designated by the states shall co-operate only with one another were considered a standard condition to be included in the Agreement because an international agreement, in which such condition was stipulated, was not ratified.

The international air transportation to/from Latvia is regulated by the International Convention on Civil Aviation, international agreements on air transport between countries as well as the Latvian laws in the field of aviation when they are not in contradiction with the norms of international agreements. Both Republic of Latvia and Russian Federation have joined the Convention on Civil Aviation and the conditions of the Convention are binding to both countries. The Convention does not permit this type of restriction on competition. The agreement between governments of Latvia and Russia on air transport was endorsed however not ratified; therefore until the ratification it is not binding for the parties of the Agreement.

In addition the Competition Council had the text of co-operation agreement concluded between Transaero and RIAIR in year 1994 concerning passenger flights between Riga and Moscow, which was effective up to October 1998 and showed that this kind of co-operation could be performed also without including in the Agreement the conditions of competition restrictions.

2. Prohibited Agreement in Courier Post Services Market

1. (a) In the territory of the Republic of Latvia state – owned joint stock company Latvijas Pasts (referred hereinafter as to LP) provides universal post services, international courier post services, accepts payments as well as other liberalised services. In the territory of the Republic of Latvia the DHL International (Latvia) Limited (referred hereinafter as to DHL) provides international courier post services in frames of centralised international network. DHL is a daughter company of Netherlands's DHL Worldwide Express B. V. Agreement of postal agency (referred hereinafter as to Agreement) was concluded on September 23, 1999 and entered into force on October 1, 1999. Competition restrictive terms of the Agreement were excluded on June 6, 2000.

1. (b) Evidences of violation were direct – Article 4.4 of the Agreement: *Post will not be involved either directly or indirectly in* the sale of any third party Services which compete with the Services, unless expressly agreed otherwise by DHL. Services mean the services of cross-border express transportation of documents and parcels, as offered by Post in the name and on behalf of DHL.

1. (c) DHL sent approx. 3500 packages per month until the Agreement was concluded (January - September, 1999). Since the Agreement was concluded amount of outgoing packages increased for 3,5% to 5% during first months. Therefore, there was no significant increasing of sales of services by the DHL after the conclusion.

1. (d) There was no effect on competition ascertained, therefore no sanctions applied. The Agreement contained terms potentially threatening competition, moreover, no other undertaking intended to co-operate with the LP in order to exploit its network for providing of services. Besides, Parties expressed initiative to terminate the violation and excluded competition restrictive terms from the Agreement.

2.(b) Average prices for EMS services provided by the LP are 3 to 5 times lover than the ones of the DHL. After sales of DHL services were started in offices of LP and EMS services were stopped, amount of packages sent via international courier post decreased approx. 3 times. There was re-orientation to other markets between former exploiters of the EMS. Clients that consider security and speed as the most important substituted the EMS with the DHL or its competitors services, clients that consider the price of the services as the most important re-oriented to universal services of the LP. Prices for DHL services sold at LP were for LVL 2 (EUR 3,5) lower than DHL's, therefore, it shall not be regarded that DHL gained some additional profit because of the Agreement.

2. (c) DHL in it's letter to Competition Council explained that by concluding the Agreement (..) *aim of DHL was not to restrict, prevent or distort competition* (..) but to strengthen the competitiveness of services provided by the LP. It shall be admitted, Article 4.4 of the Agreement may contain indications on prohibited agreement set by Article 15 of the Competition Law.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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I. – COMPETITION LAW AND POLICY IN PERU

This report summarizes Indecopi´s (Peruvian competition authority) experience, with emphasis on the description of recent cases. The following section, presents the organizational structure of Indecopi; the third, describes the administrative procedures for competition policy cases; and the fourth presents briefly two cases of restraining practices solved by the Commission of Competition Policy during the year 2000. Finally, the report presents some important new issues faced by the Commission during 2001.

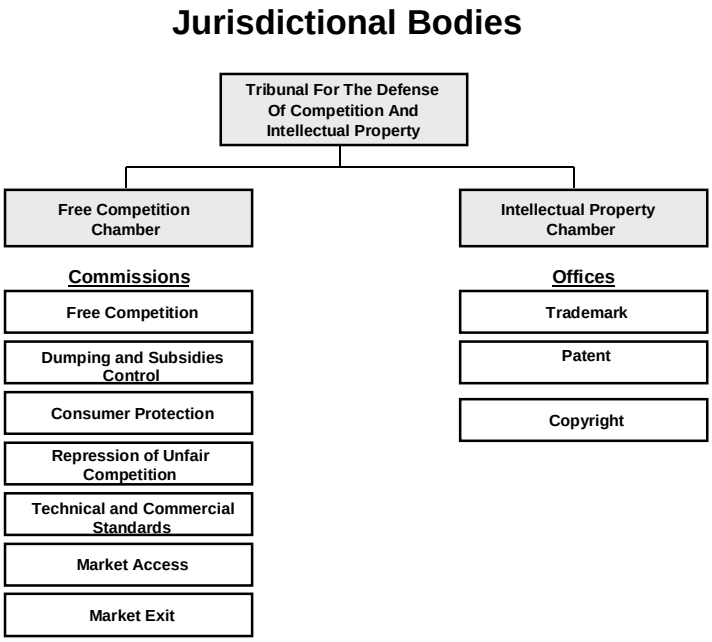
1. Organizational Structure

In the last years Peru has been undergoing major changes which have had a significant impact on the country's development. Many of the most significant changes involve the institution of a market economy system.

In this context, the National Institute for the Defense of Competition and Protection of Intellectual Property (Indecopi), was created in November of 1992 (Decree Law Nº25868 and Supreme Decree Nº025-93-ITINCI), but it opened its doors in March 1993. It is charged with being both arbiter and promoter of Peru's free market economy, focusing on two critical institutions that undergird it: market competition and intellectual property.

In broadest terms, Indecopi is divided into two parts, jurisdictional area and administration; and guided by a board of directors, represented on a day-to-day basis by the President of the Board. The jurisdictional area, in turn, is divided into two chambers: free competition and intellectual property. Both chambers are comprised of several different jurisdictional bodies, either commissions or offices.

The jurisdictional area is composed of seven commissions and three offices:



Besides these commissions and offices, the Jurisdictional Area also contains a judicial body of the second instance: the Tribunal. In fact, the Tribunal hears all appeals of cases decided at the first instance by Indecopi's commissions and offices. Tribunal members are insulated from the first instance and removable only "for cause". Their decisions are appealable directly to Peru's Supreme Court.

Regarding the implementation of competition laws, on the one hand, the Free Competition Commission is in charge of ascertaining full compliance with antitrust, controlled and restrictive laws in protection of free competition, according to the provisions of Legislative Decree Nº 701. This legislation restricts all acts or behavior that constitute an abuse of dominant position within a market as well as any restraining practices against free competition.

Therefore, the Free Competition Commission has the following duties:

a) To resolve proceedings, in the first instance;

b) To adopt the necessary corrective measures;

c) To impose the corresponding sanctions;

d) To require individuals or firms to submit any documentation including books of account, receipts for payment, business correspondence and computerized records; and to seek information relating to the organization, business, shareholders and ownership structure of firms;

e) To summon persons to the investigation or their representatives, employees, officers, advisors or third persons, by whatever means necessary, for questioning by designated officials;

f) To conduct inspections, with or without prior notice, on the premises of individuals and companies and to examine their books, records, documents and properties. During such inspections, copies of physical and computerized files and records, and photographs or films of the scene can be taken. Police might be called for assistance in gaining entry, and may make forced entry to locked premises with a prior court warrant;

g) To authorize the Technical Secretariat to seize the documents of any person or firm under investigation, for a period of up to two working days, that can be extended to two additional days;

h) To bring criminal charges where it considers that the provisions of Legislative Decree 701 have been fraudulently violated and that the resulting injury is of serious consequence to public interest;

i) To request police support as necessary in the performance of its duties.

The Free Competition Commission's work is supported by a Technical Secretariat endowed with the faculty to follow up administrative proceedings ex officio or at the request of interested parties. These proceedings aim to determine the existence of any illegal practice that breaks the law whose compliance has been charged to the Commission. The Secretariat has the following duties: a) To render opinions in cases involving violations of this law; b) To conduct inquiries and investigations on its own initiative or in response to a complaint, using the facilities and competence of the Commission on Free Competition as previously described in d), e) and f); c) In exceptional cases, and with prior consent of the Commission, it

can seize for up to two working days, or up to two additional working days, the books, files, documents, correspondence, and general records of the person or firm investigated, being able also to make copies of them. In similar circumstances, it can remove them from the place where they are located for up to six working days, provided it has a court order to do so. The request to remove records must be justified and ruled upon within 24 hours by the judge of the first instance, without transfer to the other party; d) Prepare draft regulations and adopt directives; and e) Issue injunctions, ex-officio or at the initiative of parties involved with the procedure.

On the other hand, the antitrust chamber of the Tribunal has the second and final administrative jurisdiction for cases involving violations of Decree 701. This body has the following functions:

1. Hear appeals against decisions of the Free Competition Commission.

2. Rule on appeals regarding the adoption of corrective measures and the imposition of sanctions.

3. Recommend actions necessary before the competent authorities towards the adoption of legal or regulatory measures needed to ensure free competition.

4. Request police assistance to enforce its decisions.

2. Administrative Procedures

The procedure may be initiated on its own initiative by the Technical Secretariat or at the request of a third party. Actions against infractions of Legislative Decree 701 shall prescribe after five years of the date of the infractions.

The Secretariat, if it believes there are reasonable signs of violation of Legislative Decree 701, shall notify the party presumed responsible for the investigated actions and inform it of the facts. Replies to the charges must be submitted within 15 working days, and any evidence deemed necessary may be offered; other parties with a legitimate interest may become a party to the proceedings during this period.

Within the reply period, the accused party or parties may offer a commitment to cease or modify the investigated events. This proposal is evaluated by the Secretariat and, if considered appropriate, submitted to the Commission with proposed relevant measures to guarantee fulfillment of the commitment. The Free Competition Commission shall approve or reject the proposal. Upon expiration of the accusation reply period, the evidentiary period begins, which consists of 30 working days. Upon expiration of the evidentiary period, the Technical Secretariat issues a report on the amount demanded in the accusation and suggests any measures and sanctions to be adopted.

After receipt of the Secretariat's report, the Free Competition Commission shall have 5 working days to issue its ruling. The Commission's decisions are appealable to the Competition Defense Chamber of the Competition and Intellectual Property Protection Tribunal.

Tribunal's rulings may be challenged judicially (administrative law) before the Civil Division of the Supreme Court of Justice. The Court's decision may in turn be appealed to the Constitutional and Social Law Division of the Supreme Court.

3. Recent experience

During the last year, the Competition Policy Commission initiated six proceedings about dominant position within a market and restraining practices against free competition. Five of them were initiated at a party´s request and one was initiated ex oficio.

In the same period, the Commission solved six cases, which are described in the following table:

Table 1 : Restraining practices against free competition and abuse of dominant position within a market in Peru: year 2000 (Legislative Decree 701)

	Type of Procedure	Number of Resolution	Type of conduct		First instance Decision	Sanctions
Tabacalera Nacional S.A. against British American Tabacco (South America) Limited – Perú	Party's request	002-2000/CLC	Abuse of dominant position	Predatory pricing	Accusation was retrieved	None
Taxi Tel, Trans Fox White , Kallpay y otros	Ex officio	003-2000/CLC	Restraining Practices	Collusive price fixing	Against the defendant	Cease of practice and 1 UIT to Kallpay
Asa Alimentos S.A. against Enaco S.A.	Party's request	010-2000/CLC	Abuse of dominant position	Art.5º 1st paragraph	Accusation was retrieved	None
Cab Cable against Electrocentro	Party's request	011-2000/CLC	Abuse of dominant position	Refusal to deal	Against the defendant	20 UIT and cease of practice
Municipalidad Provincial de Arequipa against Empresas de Transporte CASA, CETUAR y otros.	Party's request	016-2000/CLC	Restraining Practices	Collusive price fixing and refusal to deal	Found no grounds for accusation	None
Electro Sur Este S.A. against Inti E.I.R.L, Percy Esquivel y Quiroga CG S.R.L.	Party's request	017-2000/CLC	Restraining Practices	Bid rigging	Found no grounds for accusation	2 UIT for each firm and cease of practice

Source: Technical Secretariat of the Free Competition Commission.

As shown in Table 1, three of the cases were accusations about abuse of dominant position. One of them was an accusation from a Peruvian company (Tabacalera Nacional S.A.) against British American Tobacco (South America) Limited – Peru, on predatory pricing in the Peruvian market of cigarettes. However, Tabacalera Nacional S.A. retrieved the accusation.

Similarly, the second accusation of abuse of dominant position was requested by Asa Alimentos S.A. a food processing company against Empresa Nacional de la Coca (Enaco), a public enterprise which has the legal monopoly of trading coca leaves in Peru. However, both parties achieved an agreement and Asa Alimentos S.A. retrieved the accusation.

The third proceeding of abuse of dominant position was at request of, Cab Cable, a TV Cable firm, against Electrocentro, an electric power distribution firm. The accusation was about the refusal to provide access to the infrastructure used by Electrocentro for the distribution service, to Cab Cable. The

case was solved against the defendant and the Commission imposed a fine of 20 tax units to Electrocentro and ordered the cease of the practice. This decision has been appealed to the Tribunal.

The first case of restraining practices was initiated ex oficio against three "moto taxi" transportation service firms, located in Huanta, a city located at the south-east of Lima. The firms accused were Taxi Tours, Asociaciación de Choferes de Mototaxis de Huanta, Empresa Kallpay, Asociación de Mototaxis "Andino, Empresa "Fox White", Empresa "Taxi Tel". The details of this case are presented in the next sections.

A second case of restraining practices was requested by a public local authority, Municipalidad Provincial de Arequipa, against a group of transportation companies, Empresas de Transporte CASA, CETUAR, among others. The accusation was collusive price fixing and the joint refusal to deal implemented by these companies. The Commission declared the accusation had no grounds.

Finally, the third case of restraining practices was requested by Electro Sur Este S.A. against a group of building and construction firms, including Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L. about bid rigging. The details of this case are presented in the next sections.

With respect to restraining practices, during 2000, the Commission solved three cases, two of them about collusive price fixing and one about bid rigging.

3.1 Restraining practices: Electro Sur Este S.A. against Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L.

On December, 16th, 1997, Empresa Regional de Servicio Público de Electricidad Sur Este S.A. (Electro Sur Este), an electric power distribution company, accused Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L., two building and construction service companies, about bid rigging. The accusation referred to a practice implemented during a call for bids ("Renovación de Redes de Distribución Secundaria de la Zona Céntrica de Puerto Maldonado S.S.E.E. Nº211,405, 305 and 311") made by Electro Sur Este, for the construction of a secondary electricity net in Puerto Maldonado, a city located at the east of Peru, in the region called Madre de Dios.

Background

On November, 1997, Electro Sur Este call for bids for the construction of a secondary electricity net in Puerto Maldonado City[1]. Three companies were invited to make their economic and technical proposals: Into E.I.R.L., Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales. The three companies sent their proposals. The winner was Inti E.I.R.L

On December, 1999, Electro Sur Este accused Inti E.I.R.L. and Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales; of bid rigging.

Electro Sur Este based its claims on evidence from three type of documents presented by the three aforementioned bidders:

- Summary of economic proposal and time of construction

1. Adjudicación directa NºG-RM-001-97

- Dimensions and budget[2]

- General expenditures and dimensions[3]

These documents registered the same redaction and the same font. Moreover, the documents presented the same orthographic errors. Besides, the proposals presented the same time of construction proposal and the price bid presented by the three competitors was almost the same.

Table 2
Economic Proposals
(nuevos soles)

Company	Direct Cost	General Expenditures	Profits
INTI E.I.R.L	328,541.33	9,404.11	15,673.51
Quiroga Contratistas Generales	329,211.41	9,483.77	15,806.29
Percy Enriquez Esquivel– Ingeniero Contratista **	384,595.96	9,481.60	15,602.51

Fuente: Proofs offered by Electro Sur Este.
Elaboración: Technical Secretariat of the Competition Policy Commission

As Table 2 shows, the economic proposals of the three bidders were very similar.

Evaluation criteria

In order to prove that a group of companies were guilty of bid rigging, the Commission considered that additional indirect evidence was necessary. In particular, parallelism or similarity in economical and technical proposals must be complemented with indirect evidence indicating that such a parallelism is a result of previous agreements among competitors seeking to improve their joint profit.

In this sense, the Commission considered as indirect evidence the following "plus factors":

1. The implementation of conducts contrary to self interest of competitors but convenient to the group;

2. Radical changes with respect to common practices implemented by the firms;

3. Transaction costs involved in the implementation of the agreement;

4. Explicit or implicit claims of competitors seeking an agreement;

5. Opportunities for collusive price fixing (for example, meetings of managers previous to a significative increase in prices)

2. "Metrado y Presupuesto"

3. "Disgregado de gastos generales y metrado"

According to the representatives of Electro Sur Este, the evidence of bid rigging practices among the three above mentioned companies were:

- The coincidence of the economic proposals among the bidders
- The coincidence in the format and redaction of the three economic proposals
- The coincidence in the moment of acquisition of the three bases of the contest.

These facts were investigated and confirmed by the Technical Secretariat. Based on this indirect evidence and the absence of other reasonable explanation justifying these coincidences, different from a bid rigging practice, the Competition Policy Commission declared in favor of the prosecution.

Sanctions imposed

According to the criteria developed in the past by the Commission, restraining practices must be considered per se illegal. In this sense, bid rigging was considered illegal independently of the effects of the practice on resource allocation.

However in order to establish the type and amount of sanctions, the authority had to evaluate the negative effects of the practices on competition. Legislative Decree 701[4], defines six criteria for the determination of sanctions:

a) the type and scope of the restriction on competition.

b) the size of the market being affected.

c) the market share of the involved company.

d) the effect of such restriction on the potential or existing competitors, other agents of the economic process and the consumers and users.

e) the duration of the restriction on competition.

f) the repetition of a forbidden conduct.

In this case, the Commission considered that bid rigging implemented by the three companies did not restrain or impede the participation of other companies in the call for bids, because Electro Sur Este invited to the bid only those three companies.

On the other hand, the Commission considered the effects of the practice in terms of time and resources spent by Electro Sur Este directly or indirectly as a result of the bid rigging.

Finally, the Commission considered that this was the first time that these three companies violated Legislative Decree 701.

4. Article 23º.

As a result of this evaluation, the Commission ordered Inti E.I.R.L., Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales the cease of the practice and imposed a fine of two (2) tax units[5] to each of the companies.

3.2 Restraining practices: Taxi Tours, Asociaciación de Choferes de Mototaxis de Huanta, Empresa Kallpay and others

On January, 2000, the Competition Policy Commission opened a case against the following "mototaxi" transportation companies: Empresa Taxi Tours, Empresa "Kallpay", Asociación de Mototaxis "Andino", Empresa "Fox White", Empresa "Taxi Tel" and Asociación de Choferes de Mototaxis de Huanta, (a union of companies of the sector). The accusation was about restraining practices against free competition, in particular, collusive price fixing. All the companies involved operated in Huanta, a city located at the south-east of Lima, in the region of Ayacucho.

Background

On December, 1999, the above mentioned companies which are members of the Union of Mototaxi Drivers communicated local authorities[6] their agreement to increase the prices of mototaxi transportation services. The communication stated:

> *"..(..) we agreed to increase the cost of tickets in the urban zone of our province to S/. 70, which will be applied since next Sunday, January, 9 .."*

On January, 2000, the local authorities from Huanta accused the companies of restraining practices to free competition. The proofs presented were copies of the documents communicating about the price increase of mototaxi transportation services and a copy of the general assembly of the Union deciding to increase the price of tickets.

Evaluation criteria

Article 6º a) of Legislative Decree 701 defines a restraining practice to free competition as follows:

> *"…fixing by previous agreement among competitors, directly or indirectly, prices or other business or service conditions"*[7]

The objective of the investigation was to establish if the companies and the members of the union that requested the price increase to the local authorities of Huanta; violated article 5º of Legislative Decree 701. The investigation did not refer to the reasonability of that increment, the analysis of cost variables, among others; but if the increment in prices originated in a previous agreement among competitors.

5. Unidad Impositiva Tributaria (UIT) equivalent to nearly US$850

6. *Alcalde de la Municipalidad Provincial de Huanta.*

7. Amended by the Article 11º of Legislative Decree Nº 807.

Sanctions imposed

As a result of the investigation, it was proven that all the companies involved, participated in the agreement of fixing jointly the price of transportation service. The Technical Secretariat visited the companies in order to explain the scope of Legislative Decree 701, in particular, those articles referred to practices that restrain competition. In that visit, the representatives of the mototaxi transportation service companies recognized that the agreement was broken and committed not to make any similar agreement among them.

The companies signed a formal document in which they expressed their commitment to cease the acts prohibited by Legislative Decree Nº701. Only one company, Kallpay, didn't sign the document. This company was sanctioned with a fine of one (1) Tax Unit.

4. New issues during 2001: subsidiarity of public companies

On April, 7th 2001, the Peruvian Government enacted Supreme Decree 034-2001-PCM establishing a procedure for evaluating the activities of public enterprises in the peruvian market. In particular, this Decree develops the concept of subsidiarity of public companies, mentioned in the Peruvian Political Constitution of 1993.[8]

Subsidiarity is defined by this Decree as the intervention of public companies in markets where private firms can not satisfy the demand at the same prices and quantities than public ones. According to Peruvian Political Constitution of 1993 a public enterprise shall satisfy three conditions to intervene in the market:

i) Legal authorization by the Congress;

ii) Subsidiarity;

iii) Public interest.

The criteria defined by Decree 034-2001-PCM for evaluating the subsidiary character of public companies activities relates with:

- Competition in the market;
- Private supply characteristics;
- Public interest considerations; and,
- Other ways of Government intervention in the market

8. The Article 60 of Peruvian Political Constitution of 1993 establish that only authorized by law the state can get involved in entrepeneural activities. Such activities shall be subsidiary to private companies activities and shall be justified by public interest.

The institution in charge of administering this procedure is Fonafe (National Fund for the Financing of Public Entrepeneural Activities). Fonafe may request a technical report to Indecopi in order to evaluate competition in the market and private characteristics.

During this year, the Free Competition Commission with the technical support of the Economic Analysis Division of Indecopi, elaborated four reports about the activities of the following state owned enterprises:

- Serpost, a public postal service company;
- Editora Perú, a public company in charge of editing laws and decrees enacted by authorities;
- Sima Peru, a public company in charge of construction of boats among other activities
- Sima Iquitos, a public company in charge of construction of boats among other activities in Iquitos, a city located in the eastern zone of the country, in the Loreto region.
- Tans, a state owned air transportation company.

These reports were sent recently to Fonafe. This institution will make a decision on the need of these public enterprises' intervention in peruvian markets.

II. – DESCRIPTION OF CASE

INDECOPI´S ANTITRUST COMMISION VS. POULTRY SECTOR FIRMS

THE CASE OF PRICE FIXING IN THE LIVE POULTRY MARKET ADMINISTRATIVE ACTION PROSECUTED BY INDECOPI´S ANTITRUST COMMISSION

1. Background

On September 13th, 1996, the Antitrust Commission under the recommendation of its Technical Secretariat, resolved to start an investigation on the presumption of price-fixing, volume control, restrain of trade, and conspiracy to establish entry barriers and development of anti-competitive mechanisms to suppress and eliminate competitors, in the market of live chicken in Metropolitan Lima and Callao, between May 1995 and July 1996. The investigation involved several entities from the Poultry sector like the Peruvian Association of Aviculture (PAA) and 19 firms of the following economic groups: Ikeda, Bellido, Vidal Quevedo, Soto, and Choi Kay[9].

a) Case History

- Starting 1996, the Secretariat developed various actions in order to get a complete knowledge of the way the poultry sector was functioning.

- With that purpose, the Secretariat requested the PAA, the Center of Gathering and Distribution of Live Poultry (CADA), and other related businesses, information relevant to its market research (behavior of prices, output, traded quantities, characteristics of the trading system, etc.)

- At the same time, the Secretariat requested information and documentation from government entities: Customs, the National Institute for Statistics and Information (INEI),

9. The firms under investigation were the following:

- Ikeda Group: Avícola San Fernando S.A. and Molinos Mayo S.A.
- Bellido Group: Corporación Ganadera S.A.
- Vidal Group: Molinera San Martín S.A. and Agropecuaria Villa Victoria S.A.
- Quevedo Group: Avícola del Norte S.A. and Avícola el Rocío S.A.
- Soto Group: Agropecuaria Contán S.A., Granjas de Reproducciones El Hatillo S.A., and Haidarliz S.A.
- Choi Kay Group: El Palomar E.I.R.L and Agropecuaria del Pilar S.A.

Other firms investigated that do not belong to a particular group were: Redondos S.A., Alimentos Protina S.A., Avícola Galeb S.C.R.L, Avícola Rosmar S.A., Avícolas Asociadas S.A. and F. Car S.A.

the Ministry of Agriculture, etc. and reviewed several technical reports from private consultants regarding the situation in the poultry sector.

- The Secretariat also visited the premises of various poultry firms and associations, finding circumstancial evidence of possible price fixing –farm prices— conspiracy to restrain trading conditions and to generate entry barriers to suppress competition, in the live chicken market of Lima..

- The representatives of the Antitrust Commission Technical Secretariat found documents (proceedings of the PAA sessions) proving that once poultry producers knew about overproduction of chickens (baby chickens), they developed actions to face that problem.

- Evidence was found that producers formed a "Statistics Committee", in charge of presenting alternative solutions to that problem. The alternatives presented implied concertation within firms for its implementation. The alternatives were slaughtering and selling the excess supply of live chicken, slaughtering baby chickens, elimination of fertile eggs and the excess of reproducing hens, export of slaughtered chickens, etc.

- The producers also decided to create a firm to implement a program for freezing surplus production in order to avoid price decreases.

- Evidence found shows that within October and December 1995, the agreements and actions of these poultry firms continued: standardization of average weight, allocation of production quotas, joint elimination of surplus. Circumstancial evidence was found of anti-competitive conduct coming from a smaller group of firms (those with a high share of the market) which formed the "Poultry Strategic Alliance" (PSA)[10], having as goal to eliminate competition among its members and to strengthen the group in front of external competition.

- Evidence was found of price-fixing through output controls (volume and average weight fixing), for the period January – July 1996, and for the period April-July 1996 these output measures were complemented with an advertising campaign financed by the poultry sector aiming to increase demand and maintain the prices of live chicken.

- We would like to highlight that there is a tradition of collusive conduct in the poultry sector. During the investigation several proceedings from the PAA (Peruvian Association of Aviculture) and CADA sessions dated 1992 and 1993, stated that collusive actions were taken, either price-fixing or quantity control to avoid price decreases.

b) Legal Context of the Accusation

The accusation fits within the third article of Decree No. 70 1, that establishes that "every act and conduct related to economic activities..... limiting, restraining or distorting free competition in such a way as to generate damages to the general economic interest in the national territory" are prohibited and ought to be sanctioned.

10. "Alianza Estratègica Avìcola"

Moreover, according to article 6, of the same Decree, the practices restricting free competition are: "a) direct or indirect agreement among competitors to fix prices or other commercial conditions or services. (...) c) The allocation of production quotas. d) Agreement on the quality of products, as long as they do not correspond to national or international standards and have a negative effect on the consumer. (...) h) Agreement to limit or control production, distribution, innovations and technical development. j) Other cases of similar effect."

Conspiring on production volumes is a practice sanctioned and prohibited by the Decree Law No. 701, article 6 a), since it was understood that every agreement on volume contains implicitly the determination of price. The amendments introduced afterwards by Decree No. 807, state precisely in article 6 h), that the agreement to limit or to control production volumes is an anti-competitive practice.

Within our national antitrust law, anti-competitive business practices that aim to or have the effect of, price-fixing, are "*per se"* illegal. Included are practices or conducts that affect prices indirectly or that affect aspects related to production, distribution, price or costs information..

In that sense, the evaluation of anti-competitive conducts is limited to verifying the existence of conspiracy on anti-competitive agreements, independently of the effect they could have on the sector or on the national economy.

One argument highlighted by the attorneys of poultry producers in front of The Tribunal for the Defense of Competition and Protection of Intellectual Property (The Tribunal), was that price-fixing and output controls should be evaluated by the "rule of reason".

As it is mentioned in the Resolution of the Tribunal, Decree No.701 establishes (beyond any doubt) in its third article that anti-competitive business practices that generate or could generate the effect of restricting or hindering competition, ought to be sanctioned. When the term "could generate" is introduced, we implicitly assume that we sanction equally the practices that have an effect as well as those who do not, since what is punishable is the anti-competitive conduct.

On the other hand, the conspiracy to implement entry barriers constitutes also an illegal and punishable practice, according to articles 3 and 6 of Decree No. 701.

2. PROCEDURAL ASPECTS

- Before the procedure started, the Secretariat visited the premises of various entities and firms of the poultry sector, gathering and reviewing various documents.

- The conspiracy accusation was initially made against the following firms: The Peruvian Association of Aviculture (PAA), The Committee of Meat-Poultry Producers (CPPC-PAA), Agropecuaria Contàn S.A., Alimentos Protina S.A., and the Poultry Breeders, El Rocio S.A., Galeb S.C.R.L., Rosmar S.A., San Fernando S.A., Avicolas Asociadas S.A., Corporacion Ganadera S.A., El Palomar E.I.R.L., F. Car S.A., Granjas Avivet, Integracion Avicola German Orbezo Suarez, Molinera San Martin de Porres S.A., Molinos Mayo S.A. and Redondos S.A.

- Afterward, some other firms were added to the procedure due to their economic relationship with the aforementioned firms and based on the evidence found. The firms added to the investigation were: Agropecuaria del Pilar S.A., Agropecuaria Villa Victoria S.A., Avicola del Norte S.A., Granjas de Reproductores El Hatillo S.A. and Haidarliz S.A.

- The Antitrust Commission declared confidentiality of the information gathered since its disclosure could have affected the interests of the firms under investigation, and ordered to make the evidence of the charges placed available to the accused firms.

- When the procedure started, the Antitrust Secretariat continued visiting entities and firms related to the sector in order to gather some additional information. At the same time, some interviews were made to representatives of the firms under investigation aiming to clarify some aspects of the information gathered during the preliminary investigation. The information requested by the Secretariat was mainly data regarding production, prices, financial statements, etc. that would let to a better knowledge of the structure and functioning of the market.

- The Secretariat also gathered information from institutions and people related to the sector but who were not under investigation and whose identity was kept secret.

- Finally, the Antitrust Commission signed its Resolution charging the accused firms with conspiracy and establishing fines for each one. Poultry producers appealed and the case passed to second instance: The Tribunal for the Defense of Competition and the Protection of Intellectual Property. Thus, according to the terms and conditions established, public audiences between poultry producers and the Technical Secretariat, took place.

3. MARKET CHARACTERISTICS

- The chicken-meat production process is complex and takes a long period (451 days) until it reaches the consumer.

- The grandparents of different genetic line produce reproductive birds of the meat and eggs line respectively. From the reproductive birds of the meat line, fertile eggs of Baby Chicken of the meat line are obtained, and after their incubation –for 21 days- a Baby Chicken-Meat is obtained which will be sent to the farms for its fattening and growing. After seven or eight weeks, the chicken reaches its ideal selling weight. After that period the conversion food-weight factor diminishes significantly.

- Some firms have the process vertically integrated[11], and hence have an easier management of their business and a better position within the market. An alternative to vertical integration is the “integrated system”, by which some companies give a BB Chicken, food and technical assistance to the farms so that they do the whole growing process.

- Along the different stages of the production process there exists a competitive environment due to the presence of foreign competition.

- In Peru, there are two sub-markets of chicken-meat: the first is the market of live chicken and the other the market of slaughtered chicken, each one with defined market segments[12], different distribution chains, and distinct levels of foreign competition.

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11. “Vertical Integration” describes the property or control of one company of the different stages of the production process.

12. Consumption of live chicken is higher in the medium and lower income levels of the peruvian population.

- 80% of total chicken production in Peru is traded live, and 20% is slaughtered chicken, be it fresh or refrigerated (mainly sold through supermarkets), or frozen (used for institutional consumption and sold mainly in the southern highlands of Peru).
- In the live chicken business there are about 240 wholesalers and 8000 retailers. The wholesalers buy from the farms and distribute to the retailers. (See Annex A.1.)

- The trading process is made basically through CADA, due to the fact that when operating with registered and authorized wholesalers, producers reduce the probability of fraud and so their transaction costs. Trading of chickens outside CADA is possible but implies higher financial risks.

- At the live chicken trading level, foreign competition does not exist, due to the high costs its import would involve. However, in the frozen market, there is both national and foreign production.

- With regards to producers, the poultry sector is characterized by having big producing firms located in the northern and central coast of the country. At the moment the conspiracy accusation was made, 57.82% of chicken-meat production at the national level was concentrated in 10 firms under investigation. At the same time, within the Lima market, those same 10 firms concentrated 78.29% of the market.

4. MARKET EVOLUTION

During 1995, the supply of live chicken grew substantially due to an excess production whose only effect was to force prices down, while during 1996 there was an important reduction of supply that brought price increases.

Starting the last week of August 1995, chicken prices suffered a severe reduction (Graph 1), however, in September 1995, 1188 MT of chicken were driven out of the market, that volume represented approximately 16.35% of the amount sold through CADA during the previous month. During the months of October through December, 570 MT of nationally produced chicken were frozen and placed in the refrigerated chambers of Lima and Callao, implying that at least 570 MT were withdrawn from the market. Coincidentally, by the end of October the price of chicken reached its highest level within 1995.

At the same time, during the months of October and November 1995, the average weight of live chickens traded, suffered a noticeable reduction, changing from 2.43 Kg. in September to 2.28 Kg. and 2.29 Kg. respectively, in October and November.

From November to December the market turned more stable, the average weight increased and reached the highest level of 1995, 2.44 Kg. per chicken.

From January to March 1996, prices were more stable, showing very little changes (see Graph 2). During the period May-June 1996, prices went down, showing very low dispersion levels within the prices of various firms (see Graph 3).

5. COMPETITION ANALYSIS

Throughout the procedure the key issue was whether a price arrangement in fact took place, which according to Decree No. 701,was considered *per se* a punishable anti-competitive conduct.

Even though, according to the Law, that practice was punishable *per se*, the Antitrust Secretariat decided to deepen its investigation and analyze the competition conditions in that market in order to determine if they facilitated or not the generation of anti-competitive conducts.

a) Relevant Market Definition

Product Substitutability

- Chicken is the meat with the highest demand among domestic consumers. Chicken prices are lower than beef and than most fish which makes chicken an affordable product for most domestic consumers. (See Graph 4)

- Long term trends on per capita consumption of meat products show that chicken consumption is rising and consumption of the remainder meats has remained constant.

- The consumption data pertaining to the period 1970-1995, shows that whenever the consumption of chicken increased the consumption of fish decreased, implying some degree of substitution between chicken and fish (see Graph No 5).

- However, according to the price elasticities calculated by the Secretariat and by the National Institute of Statistics (INEI), live chicken does not seem to have any close substitute. Direct and crossed price elasticities of demand with products that could be considered possible substitutes (like jack fish, giblets, tripe, green peas, noodles, etc) show non-significant values, indicating that the demand for live chicken would not change dramatically when its price changes[13].

- 80% of total chicken production in Peru is traded live, and 20% is traded as slaughetered or frozen chicken.

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13. The calculus of Direct and Crossed Prices elasticities is:

According th Velarde: price elasticity of demand (-0.75), demand elasticity with respect to the price of fish (o.15), income elasticity (0.60).

According to the Technical Secretariat: price elasticity of demand (-0.75), demand elasticity with respecto to the price of jack fish (0.22), income elasticity (0.59).

According to the National Institute for Statistics:

Upper Income Level: Price Elasticity (-0.66), elasticity with respect to beef (0.51)

Medium Income Level: Price Elasticity (-032), elasticity with respect to the price of jack fish (0.22), elasticity with respect to the price of noodles (0.32), elasticity with respect to the price of green pea (0.13).

Lower Income Level: Price Elasticity (-0.65), elasticity with respect to carrots (0.28).

- This peculiarity of the peruvian chicken market was confirmed by direct testimony of the poultry producers, who in the public audiences held in second instance, said that consumers had a preference for live chicken (slaughtered just few moments before being sold).

Peruvian consumer preferences have originated a tendency in the poultry market to trade mainly live chicken, this jointly with the low substitutability found with other kinds of meat, led us to define the relevant market from the point of view of the product, as live chicken.

Geographic Scope

- Delimiting geographically the relevant market is the same as establishing the alternative sources to which the consumer could go if the price of the good rises in a small but significant amount.

- From the national production of chicken-meat, 65% is traded in Metropolitan Lima and Callao, while 35% is traded in the rest of the country.

- In the live chicken market, CADA accounts for almost all its trading. Competitors do not exist, since the alternative of trading chicken outside CADA (through non-accredited wholesalers) even though is possible is more expensive, implying higher financial costs and risks, higher transportation costs, etc.

- The complexity and high costs involved in live chicken imports, has limited the international trading of chicken to refrigerated or frozen chicken, which is mainly traded in the southern part of the country.

- With regards to trading of slaughtered chicken (fresh, refrigerated or frozen) the supply comes form national competitors and external competitors (Chile, Bolivia, U.S.A.), through trading channels completely different to those used for live chicken. Demand for frozen and refrigerated chicken comes mainly from the southern highlands of Peru, and from institutional consumers (hospitals, the Army, etc.) while the demand for fresh chicken comes mainly from supermarkets in the most important peruvian cities.

The strong concentration of the trading process of chicken in Lima and Callao, and the non-existence of foreign competition in that market, lead us to conclude that the relevant market in which competition conditions should be analyzed, is the market of live chicken in Metropolitan Lima and Callao.

b) Evidence Found During the Investigation

Since collusion is considered an illegal practice *per se*, the Antitrust Technical Secretariat searched for evidence on agreements established by the firms involved in the case, having as target to restrict free competition in the chicken market.

The facts found were the following:

- Since there was an obvious oversupply for 1995, producers got together –at least once every week- in its association headquarters to evaluate the market behavior and to reach and agreement on how to face the problem.

- In a session that took place in May 1995, a project was made to freeze chicken as a mechanism to avoid a price reduction in the market of live chicken in Metropolitan Lima and Callao. This project generated an agreement to trade the frozen chicken basically in the market of the southern zone of the country (Cuzco, Arequipa and Puno) in order to stop entry of imported chicken coming from Chile and Bolivia –by means of predatory pricing-- to that market and to Lima and Callao markets. In this way, barriers to entry to potential foreign competitors were created.

- During a PAA session in July 1995, a program of slaughtering and freezing of 160,000 chickens was discussed and approved. That program established the schedule for freezing and the amount assigned to each firm.

- In their discharges, some firms recognized that the freezing program had the target to force the Bolivian and Chilean chicken out of the southern zone market arguing that is was due to the sanitary problems those products were presenting. However none of these firms presented evidence to back up that argument, which in fact is almost not probable taking into account the characteristics of the product –frozen chicken- and the sanitary controls made by the Ministry of Agriculture.

- During May 1996, the firms within PAA agreed on a temporary reduction in the price of chicken and its further increase. An strategy was designed inside the PAA to allow the increase of chicken consumption, eliminating the surplus generated by a decrease in demand and the increase in the levels of breeding registered during March; with that in mind the firms agreed to decrease prices and to start an advertising campaign "Chicken with Prize" to encourage its consumption.

- Evidence found during the investigation shows clearly the intention of chicken producers to control market prices.

Main Evidence Found During the Investigation

1. - May-June 1995: Avoiding Price Reductions

Overproduction : Detecting the Problem
"Projection of Baby-Chicken Production for the period April 1995-September 1995", and the graph "Real and Theoretical Production of Baby Chickens April-September 1995", documents found in the files of the CPPC (Chicken-Producers Committee) and in some firms under investigation, which were distributed and discussed in the CPPC session of April 13, 1995.

Proposing Alternative Solutions
"Crisis Due to Overproduction of Baby-Chickens (Appraisal of Alternative Solutions)", document presented by the "Statistics Committee", discussed in the CPPC session of April 19, 1995.

Restricting Production
Sessions of May 3 and 4, 1995, where an agreement was reached to keep prices stable by restricting production and by jointly handling the surplus.
Proceedings of Alimentos Protina S.A.. Board of Directors session, dated June 12, 1995, where in order to maintain prices, the effects of overproduction on the market and the need to produce chickens with an adequate color and weight between 2.3 and 2.4 kgs. were discussed.

Implementing the Agreement

Proceedings from Alimentos Protina S.A.. Board of Directors session, dated June 12 1995, where Mr. Raul Ramos..... Document proving the agreement to standarize chicken weight to 2.2 kg.
CPPC-PAA session of July 5, 1995, in which an agreement was reached to slaughtering 160,000 chickens. Two documents found "Daily Freezing Program" (from July 10 to 17) and "Stock of Frozen Chicken".
Document dated May 3, 1995, found in Avicola El Rocio S.A., regarding the same issues of a CPPC session that took place the same date. Within the issues discussed we found the proposal of Mr. Fabres, to reduce reproducing hen imports and to suppress baby chicken and fertile egg imports and buy them in the peruvian market.

2. - September-December 1995: Price-Fixing

Colluding to Reduce Prices
Document found in the premises of CADA-LMC "Circular N 01" dated September 21, 1995, establishing that according to evaluations made in the Lima and Callao markets, the price of chicken is S/. 4.25 per Kg., suggesting not to pay a higher price.

Raising Prices
Memo No. 506/95 dated October 12 ,1995, found in Avicola El Rocio S.A. from Mr. Italo Marchand, to Mr. Rafael Quevedo, informing the issues dealt in the October 11, 1995 CPPC meeting. It is clearly understood in this document the willingness of CPPC-PAA firms, to reduce quantities supplied of live chicken, by means of reducing average selling weight to 2.2 kg. or less.
CPPC meetings that took place October 13th, 15th, and 18th. It is worth mentioning that in less than a week the CPPC-PAA met four times in search of an agreement to raise prices by restricting production.

Stabilizing Prices
Document found in the premises of Corporacion Ganadera S.A. summarizing the issues dealt in a meeting held at least before December 19, 1995. It was written 1) the surplus level for January 1996 will be 1´500,000 units, 2) Crisis similar to that of 1976 3) Probable decrease in price to S/.1.50 per kg. 4) the new agreed upon price is S/.2.40 per kg. (referring to a previous agreement).

3. - January- March 1996 : Conspiracy to Raise Prices

Conspiracy to raise farm prices
Four CPPC-PAA meetings in December, three took place in very close dates (13th, 14th, and 18th.) which is in fact an unusual situation. During these meetings, and basically in the meeting held the 18th an agreement was reached to restrict the breeding of baby chickens.
Report dated March 14, 1996, sent from Mr. Mario Romero Loly to Mr. Jorge Belevan, Trade Manager of Molinos Mayo S.A., where the conduct of several firms in response to the agreed upon price is evaluated.

4. - April-July 1996: "Chicken with Prize"

Joint Advertising/Promotional Campaign and Price-Fixing
Chicken Prices Falling Down : Alternative Solutions
CPPC-PAA meeting held April 24, 1996, in which, Mr. Hector Bellido´s proposal to reactivate advertising campaigns encouraging chicken consumption, was accepted. During that meeting, the CADA-LMC Report "Weekly Supply Report: April 16-22, 96", was disccussed. A copy of the report was found in Avicola Rosmar S.A. files.
Proceedings of the CPPC-PAA session dated May 3, 1996, indicating a definitive agreement to make an advertising and promotional campaign to encourage chicken consumption.

Implementation of the agreement: Advertising Campaign and Price-Fixing
The advertising campaign needed to be financed and controlled, for that purpose a system was established to exchange information through CADA . Confirmed by Mr. Rafael Quevedo´s testimony: "each of us had to say how much was going to sell, in order to have a quantity of coupons assigned".
June 19th session of CPPC-PAA, in which the "Weekly Supply Report: June 11-17, 96" was analyzed. A copy of this document was found in Avicola Rosmar S.A. with written notes from which we can conclude that the mechanisms agreed to raise sales and eliminate oversupply were: 1) agreed upon price reduction 2) promotional campaign

Coincidentally, two days after the June 26, 1996 CPPC-PAA meeting and once their goal was reached, a process of accelerated price rise started, being stopped only in July 17, 1996.

Annex B, includes evidence that proves the conspiracy to fix prices in the live chicken market.=

c) Poultry-Breeders Strategic Alliance (PSA) or Attempt of Poultry-Breeder´s Fusion (APF)

- In 1995 a group of firms that accounted for 56% of total trading of live chicken in Metropolitan Lima and Callao[14] adopted agreements on production, trading, input buying levels, and created the "Alianza Estrategica Avicola (AEA) which in English would be "Poultry-Breeders Strategic Alliance" (PSA), whose name was modified afterwards to "Intento de Fusion Avicola (IFA)", which translated to English would be "Attempt of Poultry-Breeder´s Fusion" (APF).

- During the procedure those firms were not able to prove that their fusion implied a permanent change in their structures. However, it was proved that those firms adopted several agreements aiming at coordinating their market behavior, restricting or eliminating competition among the group members and imposing barriers to entry into the market to third parties.

- For that purpose members of the PSA agreed on using mechanisms such as buying up (hoarding) the productive capacity of the farms or incubation plants of firms that were not part of PSA, aiming at avoiding their use by third parties; the lobby made both with bankers and government authorities was aimed at limiting the access of potential competitors to funding and the establishment of legal conditions or requirements that will stop entry of potential competitors.

- Another fact against the fusion argument of the above mentioned firms, is that even though there was a long period of time since the fusion negotiations initiated the alleged objective was not reached –which does not sound reasonable considering that much more complicated fusions have taken place in much shorter periods-- besides, no advancement in the tasks required by a fusion (like assets appraisal) was demonstrated.

- The report made by the Secretariat determined with respect to the agreements and practices developed by the firms integrating the PSA or APF, that since it was not proved that they were linked to a fusion process, they should be evaluated under articles 3 and 6 of Decree No. 701, that establishes the prohibition of any agreement, decision or practice aiming at or having the effect of, restricting or misguiding the competitors within an specific market.

- However, the Tribunal´s Resolution concluded that there was not sufficient evidence that the firms integrating the PSA have created market entry barriers. Besides, it was considered that even if some agreement restricting competition was reached within the PSA or APF, it would have been overlapped by the agreements reached and behavior generated within the frame of a bigger conspiracy made by the rest of the firms in the sector. In this sense, the Tribunal considered that it had no sense to consider this particular conspiracy as an independent practice and to punish it. In any case what this could be considered is an agreement to present a coordinated and stronger position in the bigger conspiracy negotiations.

14. Those were the firms of the Ikeda Group, Molinera San Martin de Porres S.A., Corporacion Ganadera S.A., Alimentos Protina S.A. and Granjas Avi Vet Integracion Avicola German Orbezo Suarez.

6. CASE CONCLUSIONS

a) Case Resolution

The conspiracy accusation presented by the Technical Secretariat against 21 firms for the charges of restricting competition through price-fixing, was declared FUNDADO by the Antitrust Commission in January 15, 1997. Even though at the beginning the procedure included the investigation process for fixing of production volumes, conspiracy to create entry barriers to the market, the investigation was finally centered in the analysis of price-fixing.

The Commission ordered the firms to stop the anti-competitive practices immediately and sanctioned them with fines that were set according to the type and scope of competition restriction, and to the degree of participation of each firm in the formulation, adoption and implementation of the anti-competitive agreements.

The Tribunal in second instance, reconfirmed partially first instance Resolution, in the portion referred to the infringement of Legislative Decree No. 701 for price and volume fixing. However, declared INFUNDADA the process against some firms[15] and reduced the fines imposed by the first instance.

b) Fines

The procedure proved that during the period of investigation the firms involved infringed in a continuously Decree No. 701, both before and after the passing of Decree No. 807 that increased the fine scale. In that context, it was considered in first instance that the fines to be applied were those in force at the moment the infringement took place, and so the fines applied were the ones of Decree No. 807.

The fines were imposed taking into account the degree of infringement[16], and the amounts were not higher that 10% of their sales through the Distribution Centers between May 1995 and July 1996. On the other hand, for economically related firms, in which one or several of them did not participated directly in trading of chickens, fines were calculated on the basis of sales made by the firm that did trade through the Distribution Centers and were afterwards divided between the economically related firms. With regards to PSA or APF a higher fine was applied due to the fact that the Commission considered that the agreements adopted by them were a major restriction of competition.

However in second instance The Tribunal considered that although the first instance did right when applying fines given the degree of their faults, it did not took into account an attenuating factor when calculating the fines, and it was that within the months of May 1995 and April 1996, the ruling law had a maximum fine of 50 Taxing Units for infringements to Decree No. 701[17]. According to the Tribunal, since much of the infringements to the law were made during that period, to be fair the previous fine scale has to be applied. So the amount of fines was recalculated taking into account the following:

---

15. The firms were Granjas Reproductoras El Hatillo S.A., y Haidarliz, Granja Los Huertos S.A., Agropecuaria Villavictoria S.A. y Avicola del Norte S.A.

16. The degrees considered were, important, very important, extremely important

17. According th the amendment made to the law, by the Legislative Decree No. 807, the maximum fine is 1000 Taxing Units. A Taxing Unit is the basis used for calculating taxes, fines and other charges made by the public sector. It is changed at the beggining of each calendar year and is amount if fixed by the Ministry of Economy. One taxing unit is equivalent to approximately U$900 to US$1000, depending on the exchange rate.

- The ruling fine scale during the period the practice took place.

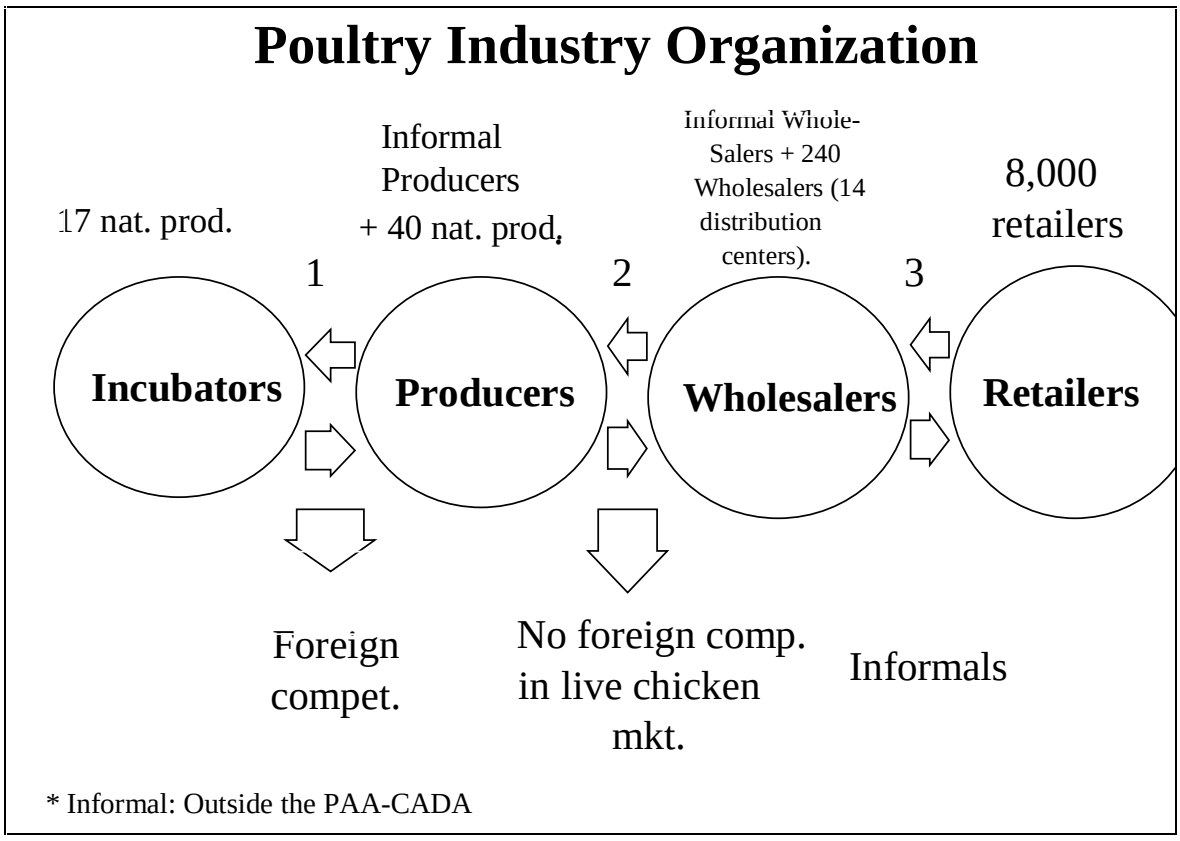
- There were charges for the development of the advertising campaign “Chicken with Prize”.

- If any anti-competitive practice done by a member of the PSA or APF existed the Tribunal considered they were overrode by the practices established by the rest of the firms. Besides, there was no evidence to back up the celebration of agreements to create barriers of entry to the market by members of the PSA.

- The fact that Antitrust law in Peru was relatively new.

ANNEX - A

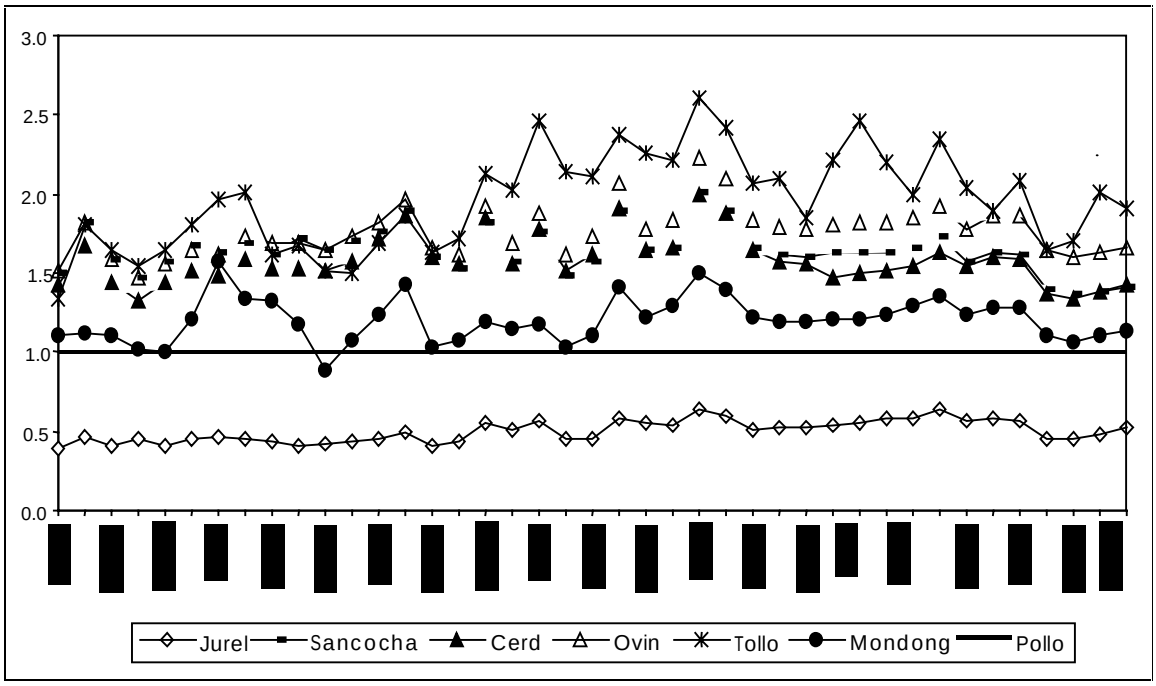
A.1. Organisational Scheme of the Poultry Sector



(Graphs 1 to 3 not available in black and white)

A.5. Relative Prices of other kinds of meat with respect to chicken.

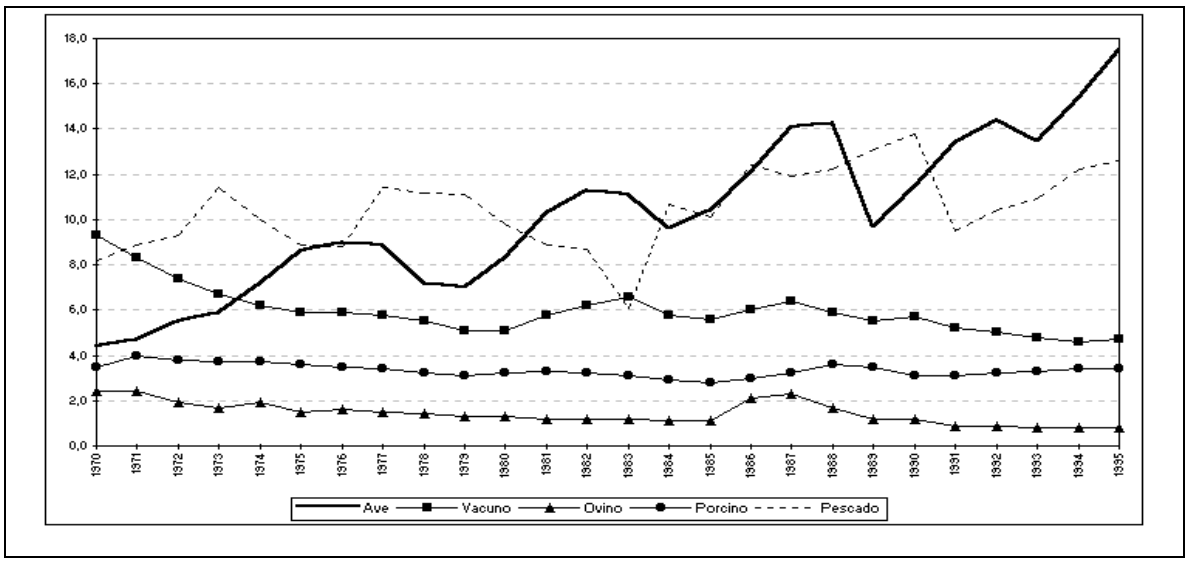
Graph 4
Relative Prices of other kinds of meat with respect to chicken
(January 1993 – May 1996)



Source: Ministry of Agriculture Elaboration: Technical Secretariat, Free Competition Commission - INDECOPI

A.6. Per head consumption of meat.

Graph 5
Per head consumption of meat.
1970 – 1995



Source: Ministry of Agriculture
Elaboration: Technical Secretariat, Free Competition Commission - INDECOPI

III. – QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

1. Please provide a citation and as much of the following information as possible for each case since January 1, 2000 in which your economy challenged a hard core cartel –i.e., an anticompetitive agreement among competitors to fix prices, restrict output, rig bids, or divide or share markets

During 2000, the Competition Policy Commission of Indecopi solved two cases related with hard core cartels.

– **Bid rigging: Electro Sur Este S.A. against Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L.**

(a) Each respondent's name, the covered product or service and geographic area, and the approximate beginning and ending dates of the cartel

Respondent names: Electro Sur Este S.A., Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L.

Product or service: building and construction services

Geographic area: Puerto Maldonado, a city located at eastern zone of the country, in Madre de Dios region

Approximate beginning and ending dates of the cartel: Was proved that bid rigging occurred one time, in December 1997.

(b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence

Nature of evidence: Indirect evidence, based in similarities of documents presented by accused firms

(c) Amount of commerce: The contract value was S/ 353 618,94, approximately US$ 100,000.

(d) Sanctions

According to the criteria developed in the past by the Commission, restraining practices must be considered per se illegal. In this sense, the bid rigging must be considered illegal independently of the effects of this practice on resource allocation.

However in order to establish the type and amount of the sanctions, the authority shall evaluate the negative effects of these practices on competition. Legislative Decree 701[18], defines six criteria for the determination of sanctions:

a) the type and scope of the restriction on competition.

18. Article 23º.

b) the size of the market being affected.

c) the market share of the involved company.

d) the effect of such restriction on the potential or existing competitors, other agents of the economic process and the consumers and users.

e) the duration of the restriction on the competition.

f) the repetition of a forbidden conduct.

In this case, the Commission considered that the bid rigging implemented by the three companies doesn't restrain or impede the participation of other companies, because Electro Sur Este called for bids only to these three companies.

On the other hand, the Commission considered the effects of the practice in terms of time and resources spent by Electro Sur Este directly or indirectly as a result of the bid rigging.

Finally, the Commission considered that this was the first time that these three companies violated Legislative Decree 701.

As a result of this evaluation, the Commission ordered Inti E.I.R.L., Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales the cease of the practice and imposed a fine of two (2) tax units[19] to each of these companies.

– **Collusive price fixing: Municipalidad Provincial de Huana against Taxi Tours, Asociaciación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel**

Product or service: "Mototaxi" transportation service

Geographic area: Huanta, a city located at the south-east from Lima, in the region of Ayacucho

Approximate beginning and ending dates of the cartel: Was proved that agreement was achieved on January, 2000, during a General Assembly of the Union Mototaxi Dirvers of Huanta.

(b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence

Nature of evidence: Direct, testimonies from mototaxi drivers

(c) Amount of commerce: Not disposable

(d) Sanctions

19. Unidad Impositiva Tributaria (UIT) equivalent to nearly US$850

As a result of the investigation, was proved that all the companies involved, participated in the agreement of fixing jointly the price of transportation service. The Technical Secretariat visited the companies in order to explain the scope of Legislative Decree 701, in particular, those articles referred to practices that restrain competition. In that visit, the representatives of the mototaxi transportation service companies recognized that the agreement was broken and committed not to make any similar agreement among them.

The companies signed a formal document in which they expressed their commitment to cease the acts prohibited by Legislative Decree Nº701. Only one company, Kallpay, didn't sign the document. This company was sanctioned with a fine of one (1) Tax Unit.

2. From all these cases, please consider when the facts most clearly illustrated the harmfulness of cartels and/or the knowledge of cartel members that the conduct was illegal and/or harmful

(a) Please supply quotations (preferably) or descriptions of cartel members' oral or written statements concerning the cartel's actual or intended effect on price

In the case, Municipalidad Provincial de Huana against Taxi Tours, Asociaciación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel the main prove of the anticompetitive agreement was a letter sent by the Union of Mototaxi Divers communicating their decision of increase prices. This letter said:

"..(..) we agreed to increase the cost of tickets in the urban zone of our province to S/. 70, which will be applied since next Sunday, January, 9 .."

(b) Please describe evidence concerning changes in price or output when the cartel was formed or when it ceased; other harmful effects of the cartel –e.g., on quality, entry, innovation, or efficiency; changes in firms profits when the cartel was formed or when it ceased; excess profits during the cartel

In the case, Municipalidad Provincial de Huanta against Taxi Tours, Asociaciación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel the intended increase in prices was from S/. 0.5 the ticket to S/. 0.8 - 1.0 (an increase of 60-100%).

"Mototaxi" is the most popular transportation service used by population of Huanta. In this sense, the effects of the increase of tickets on regional economy would be very important. However, is difficult to quantify the economic impact of the intervention.

(c) Please describe or quote the most colourful statements by cartel members revealing their intent, their lack of justification, their awareness of the illegality of their conduct, etc.

In the case, Municipalidad Provincial de Huanta against Taxi Tours, Asociaciación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel, a communication sent by the Union of Mototaxi Drivers to the Competition Policy Commission, said:

"...Our total ignorance about such an infraction lead us to establish the agreement"[20]

3. General Information on Sanctions

3. Please indicate the applicable standard of proof and the available sanctions for competition enforcement in your economy, responding separately for each different type of enforcement (administrative, civil, or criminal) that is used.

Legislative Decree 701 established three types of enforcement: administrative, civil and criminal:

i) Administrative enforcement. Legislative Decree 701 includes administrative sanctions that apply to violations to articles, 3º, 5º and 6º, such as fines and cease of practice.

Artícle 23º of Legislative Decree 701 is as follows:

"Article 23º.- Imposition and grading of sanctions. The Commission on Free Competition will impose the following fines on violators of Articles 3º, 5º and 6º:

a) If the violation is graded as light or serious, a fine up to a thousand (1,000) UITs provided that it does not exceed 10% of gross sales or income received by the violator for the immediate fiscal year previous to the Commission's decision.

b) If the violation is graded as very serious, a fine exceeding a thousand (1,000) UITs provided that it does not exceed 10% of gross sales or income received by the violator for the immediate fiscal year previous to the Commission's decision.

In case that the organization or individual being penalized does not develop any economic, industrial or business activity, or it/he has just initiated such activity after January 01 for the previous fiscal year, the fine shall exceed in no case a thousand (1,000) UITs.

In addition to the sanction that, at the Commission's discretion, shall be imposed on the violator, when a company or organization is dealt with, a fine up to a hundred (100) UITs shall be imposed on each of its legal representatives or persons forming part of the executive bodies according to their liability for the violations.

ii) Civil enforcement. Article 25 of Legislative Decree 701 establish:

"Article 25º.- Civil action. Any party adversely affected by the agreements, contracts or practices prohibited by this Law will have the right to bring a civil action for damages and losses.

Those who have been falsely accused will have also the right to bring such action."

iii) Criminal enforcement. Article 232º of Peruvian Criminal Code establish sanctions until six years of prison for violations to Legislative Decree 701

20. File Nº005-200/CLC, page 25.

"Segundo. Nuestro total desconocimiento en materia legal, conjuntamente con nuestra exposición anteriormente detallada, mno sempujó a incurrir en la infracción materia del presente descargo".

4. Please supply or describe any general schedule or set of principles use in your economy for calculating fines and other sanctions for (a) economic law violations or crimes in general, (b) competition law violations, and (c) procurement fraud, tax fraud, securities fraud, and other comparable offences. Please provide also the maximum penalties with respect to the above

Article 23º of Legislative Decree 701 establish the following criteria for grading the administrative sanction:

"…To determine the seriousness of the violation and impose the corresponding fines, the following criteria shall be considered by the Commission:

a) the type and scope of the restriction on the competition.

b) the size of the market being affected.

c) the market share of the involved company.

d) the effect of such restriction on the potential or existing competitors, other agents of the economic process and the consumers and users.

e) the duration of the restriction on the competition.

f) the repetition of a forbidden conduct.

In case of recidivism, the Commission will double the imposed fines and increase them successively and unlimitedly. To estimate the amount of fines imposed according to this Legislative Decree, UIT in force at the date of payment or the coercive collection of the fine shall be used (Amended by the Article 11º of Legislative Decree No. 807)."

Article 46º of the Peruvian Criminal Code establish, among others, the following criteria for grading the criminal sanction:

i) Characteristics of the action

ii) Damage and hazard as consequence of the action

iii) Circumstances as time, place and type of action

iv) Objective of the action

v) The attitude of the defendant

Unclassified **CCNM/GF/COMP/WD(2001)5**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **25-Sep-2001**

English text only

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP/WD(2001)5
Unclassified

OECD Global Forum on Competition

CONTRIBUTION FROM ROMANIA

This contribution was submitted by Romania as a background material fro the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

JT00113254

English text only

COMPETITION LAW AND POLICY IN ROMANIA

Romanian Competition law no. 21/1996 was enacted on April 30, 1996 and entered into force on February 1st, 1997. The scope of the law is to protect, maintain and stimulate competition and a normal competitive environment, with a view towards promoting consumers' interests. At the same time, it aims to observe the commitments set forth in Romania' s Association Agreements, especially Art. 64 providing for the necessity to establish competition rules.

Number and classification of the analysed cases

In 2000, the Competition Council analysed 437 cases, as follows:

A.	Agreements, decisions and concerted practices (art. 5)	85
	Out of which:	
	- complaints	20
	- requests for negative clearance	11
	- notifications for block exemptions	54
B.	Abuse of dominant position (art. 6)	22
	Out of which:	
	- complaints	21
	- requests for negative clearance	1
C.	Economic concentrations (art. 11)	237
D.	Advisory Opinions	30
E.	Opinions	6
F.	Other cases*	57
	Out of which:	
	- Complaints	54
	- ex officio cases.	3

The following table presents the evolution of the cases analysed by the Competition Council between February 2, 1997 (date on which the Competition Law came into effect) and December 31, 2000:

Cases	1997	1998	1999	2000
Agreements, decisions, concerted practices (Art. 5) and abuse of dominant position (Art. 6)	72	73	77	107
Economic concentration (Art.11)	10	50	173	237
Advisory Opinions	41	57	75	30
Opinions and other requests for clarifications	19	7	29	6
Other cases	29	44	48	57
Total	171	231	402	437

The economic concentrations have the most important weight in the total number of cases, namely 54% in 2000 comparing to 43% in 1999, 22% in 1998 and 6% in 1997.

Case analysis

The following table presents the cases analysed by the Competition Council in 2000 under different categories of practices and resolving way:

Categories of cases	Total	Resolving way		
		Decisions	Letter without a decision	Pending
A. Complaints, ex officio cases, out of which:	98	62	21	15
- Art. 5 (agreements)	20	12	3	5
- Art. 6 (abuse of dominant position)	21	13	3	5
- Other articles	23	13	6	4
- Complaints that do not fall under the law	34	24	9	1
B. Requests for negative clearance	12	9	-	3
C. Requests for individual exemptions	-	-	-	-
D. Notification for block exemptions	54	47	-	7
E. Economic concentrations	237	194	-	43
F. Advisory Opinions	30	-	30	-
G. Opinions and other requests for clarification	6	-	6	-
Total	437	312	57	68

The statistics indicate that, out of the 437 cases registered and analysed by Competition Council in 2000, 369 cases were solved.

The percentage of cases solved in 2000 was 84%, being approximately equal to the levels of the previous years (91% in 1998 and 88% in 1997).

Complaints to the Competition Council

In 2000, the Competition Council received 95 complaints alleging the violation of the Competition Law. Out of the total complaints, 20 complaints concerned the violation of article 5 (agreements among undertakings), 21 complaints concerned the abuse of dominant position (art. 6), 20 complaints concerned the violation of other articles of the law and 34 complaints did not concern the violation of the Competition Law.

The following table shows the evolution of complaints between 1997-2000:

Cases	1997	1998	1999	2000
Complaints regarding agreements, decisions and concerned practices (Art. 5)	48	12	10	20
Complaints regarding abuse of dominant position (Art. 6)	3	30	18	21
Complaints regarding other articles of the Law	14	11	13	20
Complaints which did not fall under the Law	15	28	35	34
Total	80	81	76	95

Investigations pursued by the Competition Council

In 2000, following the analysis of cases made by the Competition Council, 9 investigations were opened through the Order of the President of the Competition Council; 8 investigations opened in the previous years were continued in 2000. 10 of these 17 investigations were finalised till the end of the year and 7 are on going in 2001.

These 10 cases concluded by the Council's rapporteurs regard:

- complaints on agreements, decisions and concerted practices 1
- economic concentrations 7
- omission of notification 2

Competition Council decisions

Between 01.01.2000 - 31.12.2000, the Competition Council issued 519 decisions, as follows:

a) decisions on the analysed cases 548
Out of which:

- decisions resolving the cases, issued by the *Competition Council* 530
- decisions imposing fines to undertakings, issued by commissions 15
- decisions of the President of the Competition Council regarding the appeals by undertakings 3

b) decisions on the cases investigated by the *Competition Office*[*] 11
Out of which:
- decisions resolving the cases, issued by the Competition Council 8
- decisions imposing fines to undertakings, issued by commissions 1
- decisions of the President of the Competition Council regarding the appeals by undertakings 2

[*] The activity of the Competition Office is not subject of this report

The following table presents the decisions on the cases analysed by the Competition Council:

Cases	Total	Out of which:		
		Decisions resolving cases	Decisions imposing fines	Decisions on appeals
A. Agreements, decisions and concerted practices (art.5), out of which:	289	284	2	3
- complaints	24	19	2	3
- requests for negative clearance	9	9	-	-
- requests for individual exemptions	-	-	-	-
- notifications for block exemptions	256	256	-	-
B. Abuse of dominant position (art.6)	13	13	-	-
C. Economic concentrations (art.11)	216	200**	14	2
D. Other cases	41	41	-	-
Out of which:				
- cases which fall under other articles	17	17	-	-
- cases which do not fall under the law	24	24	-	-
Total	559	538	16	5

Out of the 437 cases analysed in 2000, 312 cases were solved by decisions. The most decisions concern agreements and economic concentrations (90%). The remainder of 10% concerns decisions on the abuse of dominant position and other cases that do not fall under articles 5, 6 and 11, which were already mentioned, or do not fall under the Competition Law.

The number of decisions on agreements is still large due to the decisions following notifications for block exemptions.

Out of the 576 decisions issued by the Competition Council in 2000, on the basis of the Competition Law no. 21/1996 and of the Law on State aid no.143/1999, 19 decisions were appealed: 15 at the Bucharest Court of Appeals and 4 at the Supreme Court of Justice, administrative contentious section.
For 8 of the 15 appealed decisions, the sentences given by the Court of Appeals were in the favour of the Competition Council and remain definitive by non-appealing. 5 sentences issued by the Court of Appeals were appealed by the Competition Council at the Supreme Court of Justice, where the causes are on going.
2 of the appealed decisions were pending at the Court of Appeals at the end of the year.
4 of the 5 decisions made by the Competition Council's President were appealed at the Supreme Court of Justice, pending at the end of the year.

In 2000, the Competition Council granted 30 favourable advisory opinions, as follows:

- 4 advisory opinions on draft Government Decrees;
- 26 advisory opinions on previous notifications for economic concentrations.

**It also includes 6 decisions on recalculating the authorization fee for economic concentrations

Anticompetitive practices

Agreements between undertakings

According to art.5, par.(1) and (2) the agreements between undertakings may be classified in: prohibited agreements – deemed *"per se illegal"* - and agreements excepted in the extent of meeting certain cumulative conditions.

The benefit of exemption is individually granted for agreements proving that are cumulatively met the conditions stipulated in art. 5, par. (2) and, for certain categories of agreements, by meeting the criteria of qualifying into the categories established by Competition Council's regulation.

In 2000, out of the 85 analysed cases, 70 were solved: 15 complaints, 8 requests for negative clearance, 47 notifications for block exemptions – and 15 were still pending at the end of the year.

The inventory of solved cases is, as follows:

Cases	Total	Solved cases		
		Without decision	By decision	Pending
Complaints	20	3	12	5
Requests for negative clearance	11	-	8	3
Individual exemptions	-	-	-	-
Block exemptions	54	-	47	7
Total	85	3	67	15

The Competition Council made 279 decision on the cases falling under art. 5 of the Competition Law, out of which 4 decisions on the cases still pending at the end of 1999.

The following table inventories the decisions made by the Competition Council:

Cases	Total	Decisions	Other decisions	
		Authorisation	Commissions	Appeals
Complaints	15	2*	11	1	1
Non-intervention requests	8	8	-	-	-
Block exemptions	256	253	3	-	-
Total	279	263	14	1	1

* out of which a decision on in-depth investigations on SNTR SA case

Complaints

Twenty complaints alleging infringements of art. 5(1) of the Competition Law were analysed in 2000. The cases were solved as follows: 12 by decisions, 3 by reasoned answer (without decision) and 5 were pending at the end of the year.

Fifteen decisions were issued for the solved cases, out of which: 3 decisions for cases registered in 1999 and 10 decisions for cases registered in 2000; 1 decision solving an appeal and 1 decision imposing a sanction under art. 56, let.(a).

The following structure inventories the decisions made by the Council:

Decisions admitting the complaints	2
Decisions denying the complaints	11
Decisions imposing fines	1
Decisions on the appeals	1

The Competition Council also issued decisions on 9 cases analysed by the Competition Office, as follows:

Decisions admitting the complaints	4
Decisions denying the complaints	2
Decisions imposing fines	1
Decisions on the appeals	2

Abuse of dominant position (art.6)

Represents an anticompetitive practice that may have as object or as effect the distortion of trade and prejudice to consumers, being forbidden under the provisions of art. 6 of the Competition Law.

In 2000, 21 complaints were submitted at the Competition Council, claiming abusive use of dominant positions by anticompetitive practices and a request for non-intervention solved by a certifying decision.

The complaints were solved as follows: 3 by reasoned answer (without decision), 13 were solved by decisions and 5 were still pending at the end of the year.

The complaints were solved as follows:

- Number of cases 21
- By letter response, without decision 3
- Decisions 13

  Out of which:

  - admitting -
  - rejecting 13
- Pending 5

The complaints solved by decisions were rejected as ungrounded

Economic Concentrations

The Competition Law defines in art.11(2) the situations when an economic concentration takes place:

- merger of two or more previously independent undertakings;
- acquisition of control over one or more undertakings by one or more persons, already holding the control over one or more undertakings.

The economic concentrations that have as effect the creation or strengthening of a dominant position, leading thus or likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it are banned under the Law on competition no. 21/1996.

The economic concentrations exceeding the threshold stated under art.15 of the Competition Law no.21/1996 are subject to control and must be notified to the Competition Council. By Order of the President of the Competition Council, the threshold is periodically updated based on the evolution of general price index but not more frequently than every 6 months. Economic concentrations where the aggregate turnover of the involved undertakings exceeded 25 billion ROL were notified at the Competition Council during the analysed period.

In 2000 a large number of economic concentrations was notified as a result of the small legal threshold of 25 billion ROL (approx. 1.250.000 EURO) and as a result of the large number of economic concentrations made by acquisition of control through purchasing shares and assets in the privatising process.

In 2001, the threshold stipulated in art. 15 of the Competition Law was updated through order of the Competition Council's President from 25 billion ROL up to 65 billion ROL (approx. 3.250.000 EURO).

In 2000, the balance of the economic concentrations operations notified to the Competition Council is the following:

Total notified economic concentrations	237
- cases solved by decisions:	194
- within the initial 30 days analysis period	187
- following an investigation	7
- pending cases	43

The decisions on economic concentrations taken by the Competition Council are as follows:

- decisions on economic concentration notifications:	194
- decisions concerning omissions to notify economic concentrations:	2
- decisions by the Competition Council' Commissions sanctioning certain undertakings:	14
- decisions by the President of the Competition Council on appeals by undertakings against certain decisions of the Commissions of the Competition Council:	2
- decisions on recalculation the concentration authorisation fees	6

Cases solved by decision following an investigation

Nine decisions following investigations were taken in 2000. Out of these, 7 concern notifications of economic concentrations and 2 concern omissions by undertakings to notify the economic concentrations in which they are involved.

For the 7 cases regarding notifications there were issued: 2 authorising decisions, 3 conditional authorising decisions and 2 rejecting decisions.

Tubman (international) Ltd case

Tubman (International) Ltd/SC Silcotub SA Zalau

Tubman (International) Ltd acquired from SOF (State Ownership Fund) 71,96 % of the social capital of SC Silcotub SA Zalau, 69,99% of the social capital of SC Laminorul SA Braila and 69,99% of the social capital of SC Petrotub SA Roman.

Following the notification of the economic concentration between Tubman (International) Ltd. and the above mentioned undertakings, the President of the Competition Council ordered an investigation to be opened.

The Competition Council issued 3 decisions as follows: 2 decisions approving under art. 52, par. (2), let a) the acquisition of SC Silcotub SA and Laminorul SA Braila and one decision prohibiting under art.52, par.(1), lat. b) the economic concentration between Tubman (International) Ltd. and SC Petrotub SA Roman.

With regard to the decision authorising the economic concentration between Tubman (International) Ltd. and SC Silcotub SA Zalau worth mentioning:

The industrial sector affected by the notified economic concentration is the tubs' production;

A part of the SC Silcotub SA Zalau production concerns the industrial and civilian building and plumbing. These tubs may have as substitute the longitudinal and helicoid soldered tubs, further referred to as ordinary tubs. On this market the competition is higher and consequently not affected by this economic concentration. Unsoldered tubs - that cannot have as substitute the soldered tubs, are called unusual tubs. The market of these tubs is affected by the control taking over by Tubman (International) Ltd. on SC Silcotub SA Zalau.

The market segment is not altered by the economic concentration, as Tubman (International) Ltd. has never been present on the relevant market.
The Competition Council authorises this economic concentration because no dominant position is to be created or consolidated on the relevant market having as effect a significant restraint or distortion of competition.

Tubman (International)Ltd./SC Laminorul SA Braila

Having regard to the decision authorising the economic concentration by acquisition of 69,99% from SC Laminorul SA Braila social capital by Tubman (International) Ltd., the control taking over on SC Laminorul means a downstream integration. Laminorul will use as raw material the refuses of Silcotub SA Zalau.

Having regard to the control of Duferco group upon Tubman (International) Ltd. and to the specific activities of this group, the case would also be of an upstream integration.
The Competition Council authorises this economic concentration because no dominant position is to be created or consolidated on the relevant market having as effect a significant restraint or distortion of competition.

Tubman (International) Ltd/SC Petrotub SA Roman

The decision prohibiting the economic concentration made by the acquisition of 69,99% of SC Petrotub SA Roman social capital by Tubman (International) Ltd, ascertained that Tubman would have a dominant position on the relevant market if the economic concentration took place. The market share found by the Investigation report is 76,49%, resulting from the summation of the market shares held by Silcotub SA Zalau and Petrotub SA Roman.
Considering the fact that Silcotub and Petrotub competed on the relevant market, it becomes obviously that the merger of the two undertakings will have as effect at least the maintaining of the market share for a while.

Therefore, the economic concentration between Tubman (International) Ltd. (which controls SC Silcotub Zalau) and SC Petrotub SA Roman represents an horizontal economic concentration, acting on the affected relevant market.

Consequently, Tubman (International) Ltd will hold a dominant position on the relevant market, resulting in a significant restraint of the competition and in the possibility to eliminate the competitors. This possibility is facilitated by the fact that SC Petrotub SA Roman is the sole producer of unsoldered big tubs, this aspect affording the use of “cross subvention”.
For these reasons the Competition Council prohibited this economic concentration. The decision was appealed at the Bucharest Court of Appeal which sustained it. The decision of BCA was not appealed.

Michelin / Tofan holding case

In the year 2001 Competition Council has investigated the economic concentration through which COMPAGNIE FINANCIERE MICHELIN took over the control of TOFAN HOLDING SA . TOFAN HOLDING SA is a Romanian tyre producer and owns two tyres plants, one reconditioning plant and the national distribution system of tyres. The relevant markets are: market of motor car tyres and market of truck tyres.

As a result of economic concentration COMPAGNIE FINANCIERE MICHELIN owns a market share of 58.91% of market of motor car tyres and 56,50% of market of trucks tyres and consolidates its position on the two markets. The provisions of the agreements to which Romania is a part, stipulate that custom duties should decrease. The access on the tyre market is facilitated by the lack of barriers to entry.

Taking into account that the notification of economic concentration accomplish the cumulative conditions of art.14(2) a) ,b), c) of the Competition Law and the consumers will benefit of lower real prices as a consequence of investments, the Plenum of the Competition Council authorised with conditions the economic concentration.

Mineral water case

National Company of Mineral Waters (NCMW) is a company that resulted from the reorganisation of the Regie Autonome of Mineral Waters (RAMW), having all the rights and obligations of the latter undertaking.

Mineral water extraction is the exclusive prerogative of NCMW which was directly licensed to it by the National Agency for Mineral Resources (NAMR) (the regulatory authority in the field). The licenses were granted for the exploitation of mineral resources within 30 areas. Subsequently, NAMR granted licenses to other undertakings but only following tendering. In 1997, NCMW's scope of activity enlarged and the company could also operate in the bottling area, thus becoming a potential competitor for the undertakings operating on bottling market.

NCMW owns exploitation licenses although it takes only partially part to exploitation and extraction, respectively. Consequently, the mining product is the extracted mineral water for which the licensee pays royalties determined on the extracted mineral water.

As for undertakings vertically integrated and licensed following a tendering organised by NAMR, the mining product is the mineral water bottled and traded, the royalty being determined on the value of this product.

Bottling undertakings purchasing the extracted mineral water from NCMW do not pay royalties due to the fact that they do not own exploitation license.

NCMW delivers the extracted sparkling mineral water to the bottling undertakings according to the contracts concluded with them, the bottling undertakings being obliged to pay the whole quantity of mineral water within the contracts even if that quantity was not delivered. NCMW sets a unique price for all undertakings irrespective to the source within the contract and the main item for setting the price is NCMW's own costs.

Bottling of the mineral water delivered by NCMW is ensured by 24 undertakings that are almost all members of the Employers' Association "APEMIN".

1. Relevant market

Product market

Two product markets were identified, as follows:

- The first market is defined by the selling-buying relations between NCMW and the bottling undertakings, the product being the extracted mineral water purchased by the bottling undertakings as a raw material;
- The second market is defined by the trading relations between the bottling companies and the end consumers, the product being the bottled mineral water as a food product.

Geographic market is defined in both cases as Romania's market.

2. Anti-competitive facts

The price of the extracted mineral water was set through negotiations between NCMW and the undertakings within the Employers' Association "APEMIN". In 1997, after the Competition Law no. 21/1996 came into effect (on February 1, 1997), NCMW transmitted to its clients additional acts to the existing contracts that provided for the new delivery price. The new price was accepted without any objection both by the members and the non-members of the Employers' Association "APEMIN".

NCMW announced the opening of negotiations for increasing the price of mineral water with each bottling undertaking. Since the bottling undertakings did not respond to NCMW's invitation, NCMW sent them another notice stating that in case they would have not taken part in the negotiations, NCMW considered the bottling undertakings accepted the proposed priced. The members of Employers' Association "APEMIN" agreed to refuse the price augmentation by considering that the costs did not justify the proposed price. That agreement as to refuse the price augmentation was not considered anti-competitive according to the Romanian Competition law.

Subsequently, in spite of the fact that the members of Employers' Association "APEMIN" decided to deny the price augmentation and empowered APEMIN's chairman to negotiate the price of mineral water with NCMW, the majority of the members of Employers' Association "APEMIN" accepted the new price, expressly, by signing the additional acts, or tacitly, by paying the bills.

Firstly, the members of the Employers' Association "APEMIN" agreed to fix the price of the mineral water in a concerted manner, indirectly affecting the decision-making independence of the other undertakings, non-members of the Employers' Association "APEMIN", and concluding in that way an agreement prohibited by the Competition law.

Secondly, NCMW and the members of the Employers' Association "APEMIN" agreed to fix the price of sparkling mineral water. That price was charged by NCMW to all clients, including non-members of the Employers' Association "APEMIN".

On the other hand, NAMR granted a significant number of areas to a sole company – NCMW-without a tendering, which affected competition on the market defined by the trading relations between NCMW and the bottling undertakings. Discriminatory setting of mining royalty by NAMR also led to disadvantages for the vertically integrated undertakings due to the fact that they had to pay a royalty 30 times higher than the one paid by NCMW considering that the mining product was the same. As for the mining product based on which the royalty is set, NAMR took into account in case of NCMW the extracted, not processed and not delivered mineral water but for the vertically integrated undertakings it considered the bottled and traded mineral water.

3. Decision of the Competition Council

Having in view all the facts mentioned above, the Competition Council decided that NCMW and the bottling undertakings, members of the Employers' Association "APEMIN", infringed the Competition Law no. 21/1996 (art.5(1)(a)) by fixing a unique price for the extracted mineral water, on the one hand, and that NAMR infringed the Competition law (art.9(1)(b)) by granting without tendering 30 areas for mineral water extraction and by setting discriminatory conditions for undertakings when determining the royalty, on the other hand. The Competition Council imposed fines to NCMW and the bottling undertakings involved in the anti-competitive practice.

QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

ROMANIAN PHARMACISTS TRADE ASSOCIATION CASE

Following the complaints received from many natural and legal persons that intended to enter on the Romanian drug distribution market against the members of Pharmacists Association, that are also present on the same market as undertakings and have put barriers to entry on the market, the Competition Council opened an investigation which was finalised by a decision made in December, 2000.

1.

a) Consumers Goods Department, Zoe Radetchi- competition inspector;
The product: drug;
Geographic area: Romania's territory;

The approximate beginning date of the agreement among the existing pharmacists on the market, that are also managers within the Romanian Pharmacists Trade Association, coincides with the date of setting up the association, respectively the year 1997. The ending date of the agreement is December 2000.

b) The evidence of collusion was direct, written, i.e., approval criteria notes, motivations of refusal to issue approval, ads published on closing the drug market, etc.

c) Amount of commerce :The estimated monetary value of all sales on the drug distribution market is USD 400 million/ year and depends on the purchasing power and morbidity of population. Having in view that organisation structure of Pharmacists Association covers all Romania's territory, the agreement aimed at sharing this amount among existing undertakings since the entering on the market of new undertakings could diminish the profit of the existing undertakings.

c) Sanctions: The fine applied according to the Competition Law has been calculated as a percent of profit of the Pharmacists Association (this profit is different from the profit obtained by the members of association as undertakings)

2.

(a) Because of social policy reason the price of drug is still regulated in Romania, the mark-up can not be over a limit. Under this limit the competition on prices can exist but mainly the competition on quality is present.

(b) The effects on prices and selling amount because of the "closing" of the market for new competitors cannot be estimated in this case. On the other hand, it is obvious that by this anti-competitive practice the members of the Association management board have intended to eliminate the potential competitors in order to obtain advantages but not in consumers interests;

(c) The Pharmacists Association was found guilty because:

- together with the Ministry of Health have established the geographic criterion (the distance between two pharmacies must be of minimum 250 m) and the demographic criterion (a

pharmacy may be set up only if the population of the respective community divided by the number of the existing pharmacies. is more than 5000) which were regulated by a Minister order;

- together with the Ministry of Health have established through the same order that the setting up of a new pharmacy needs the approval of the Pharmacists Association which will check, among other things, the fulfilment of the above mentioned criteria;
- the Pharmacists Association also introduced, through a note, other criteria for approval such as a cases where propriety right of the pharmacist on his own pharmacy is not legally grounded;
- the Pharmacists Association from certain counties and Bucharest listed the cities in which the demographic criterion did not any longer permitted the setting up of new pharmacies;
- under different reasons, the Pharmacists Association refused to approve the setting up of new pharmacies by the undertakings which have already owned pharmacies.
-

(d) Although establishing demographic and geographic criteria was, in principle, a measure aimed at improving the supply of drugs to population, the way it was put in practice did not allow that this objective to be reached.. As a result of these facts in many villages does not exist any pharmacy but in the cities the number of the pharmacies is very high.

Unclassified **CCNM/GF/COMP/WD(2001)6**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

CCNM/GF/COMP/WD(2001)6
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OECD Global Forum on Competition

CONTRIBUTION FROM SLOVENIA

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ANNUAL REPORT OF THE COMPETITION PROTECTION OFFICE OF SLOVENIA

-- 2000 --

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1. INTRODUCTION

The year 2000 was the first full year in which the Prevention of the Restriction of Competition Act was in use. The advantage of this Act in comparison with the previously valid legislation lies in its higher transparency, clear definitions of competencies, the introduction of procedural rules and in the adoption of penalty provisions, which enable the Competition Protection Office (CPO) to obtain information during the process.

The normative framework, which is completed by statutory regulations adopted in 2000, is the basis for the effective protection of competition. It could not, however, exist without qualified and independent bodies and without the important role of courts of justice. The necessity to assure adequate human and financial resources is of equal importance.

Qualified staff are needed for correct assessment of individual forms of restriction. Training CPO officers has been pursued through multilateral and bilateral forms of co-operation, coupled with special training within the CPO.

In addition to transparent legislation and qualified institutions there must also be awareness of the meaning of efficient competition and of the adverse effects of restraining competition to achieve efficient protection of competition. The preventive function of the CPO is therefore also very important.

Improving the competition culture is one of the issues that the CPO gave special attention in 2000. This was reflected mainly in a constant openness for communication and in responding to deviations in a timely and correct manner, but also through different forms of providing information and educating participants in the market.

The trend to increasing the level of competition culture was also well-accepted by participants in the market, where the media played a very important role by providing correct information and showing high understanding of regulatory issues, thus promoting the importance of protecting competition and consequently raising the level of the competition culture.

Handling notifications of concentration represented the greater part of the operational work in 2000. In the second half of the year, the impact became evident of the adopted decree defining the contents and elements required for the notification form for the concentration of undertakings. A database has been assembled to assist faster decision making and general overview of the market.

The creation of the database has enabled simultaneous monitoring and analysis of specific industrial sectors, especially telecommunications. This kind of monitoring is necessary mainly because of CPO's active role in the formulation of legislation, the prime reason of which is introducing competition into specific sectors such as telecommunications, traffic, energy and media.

Dealing with restrictions of competition statistically represented a minor part of CPO's operation in 2000, mainly because of the prescribed time framework, which determines the disposal time for decision taking about notified concentration. However, in the second half of 2000, there was a tendency toward more time being devoted to the assessment of restrictive agreements.

Looking back at 2000 reassures us that the proper directions were followed (the full enforcement of law, training CPO's officers, timely and correct manner of cases assessment, preventive function and the contribution to an improved level of competition culture) and that they present adequate starting-points for the future.

The directions, which can be discerned from the overview of CPO's work in 2000, lead us into a more thorough assessment of classic restrictions of competition, co-operation in liberalisation processes within industries and in improving the level of the competition culture. We are not only committed to do so because of the existence of the rules of legislation in force, commitments from negotiating positions and the national programme for adoption of the Acquis of the European Union, but primarily because of our shared responsibility for progress and joining the common European market, which is not imaginable without efficient competition.

The year 2000 brought an improvement in both normative and operational points of view. The aims turned out to be achievable, progress is visible, although it is clear that for the effective protection of competition it will be necessary to assure adequate human and financial resources, together with efficient judicial protection and, above all, an efficient system of penalties for violators. From that perspective, it could be said that 2000 was not entirely positive, but identifying achievements and unresolved problems defines tasks and challenges for 2001 and coming years.

Andrej Plahutnik, director

2. LEGISLATION

The foundation of the legal framework of competition rules lies in the Article 74 of Constitution of the Republic in Slovenia. The third paragraph of the above mentioned Article prohibits all practices that restrict competition in a manner contrary to the law.

The Prevention of the Restriction of Competition Act[1] was adopted on 30 June, 1999 by the National Assembly of the Republic of Slovenia. This act succeeded the provisions of the Protection of Competition Act[2], which regulated the area of restriction of competition. As a modern act, fully aligned with material and procedural legislation of EU, it regulates all three areas of restriction of competition by undertakings: restrictive agreements, abuse of a dominant position and concentrations.

The new act contains a special chapter on the procedure of decision-making by the CPO, providing for the subsidiary use of the Administrative Procedure Act[3]. Final decisions of the CPO may be reviewed by the Administrative Court in an administrative dispute and appeal may be made to the Supreme Court. This differs from the arrangement under the Protection of Competition Act, under which the affected undertaking could bring an action in civil procedure.

The legislator has also included a chapter on restrictions of the market by authoritative legal instruments and actions but excluding the assessment of the legality of such instruments and actions from the jurisdiction of the CPO.

The Act envisages the enactment of a decree on block exemptions and a special application form for notification of concentrations.

The Decree on the application form to notify a concentration[4] defines the content and elements required for the notification form for the concentration of undertakings, which the notifying party must submit to the CPO in accordance with Article 12.

The Decree on Block Exemptions[5] defines groups of restrictive agreements, which when fulfilling positive and negative conditions under Article 5 and Article 9, are not contrary to the law and therefore permitted. On the basis of this decree, the Instructions on the Method and Conditions for Defining the Relevant Market[6] have been enacted, forming the basis for the determination of the market power of undertakings in procedures before the CPO.

Still valid provisions of the Protection of Competition Act which regulate dumped and subsidised import, together with the Decree on Dumped and Subsidised Import[7] determine the competencies of the CPO in antidumping procedures and procedures against subsidised import. These provisions extend the

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1 Prevention of the Restriction of Competition Act, Official Gazette of the Republic of Slovenia, No. 56/1999, came into force on 14 July, 1999.

2 Protection of Competition Act, Official Gazette of the Republic of Slovenia, No. 18/1993.

3 Administrative Procedure Act, Official Gazette of the Republic of Slovenia, No. 80/1999.

4 Decree Defining the Contents and Elements Required for the Notification Form for the Concentration of Undertakings, Official Gazette of the Republic of Slovenia, No. 4/2000.

5 Decree on Block Exemptions, Official Gazette of the Republic of Slovenia, No. 59/2000.

6 Instructions on the Method and Conditions for Defining the Relevant Market, Official Gazette of the Republic of Slovenia, No. 83/2000.

7 Decree on Dumped and Subsidised Import, Official Gazette of the Republic of Slovenia, no. 38/1999.

competencies of the CPO from the protection of competition toward measures of a pure commercial character.

3. RESTRICTION OF COMPETITION BY AGREEMENTS

Prohibition of restrictive agreements

According to the Act restrictive agreements are in principle prohibited, but under certain conditions may be exceptionally permitted. Restrictive agreements within the meaning of Article 5(1) are null and void. Restrictive agreements are deemed to be agreements between undertakings regarding business conditions in the market which have as their object or effect the prevention or distortion of competition in the Republic of Slovenia. Prohibited restrictive agreements are defined by virtue of a general clause having the primary character. The prohibition refers to horizontal as well as to vertical agreements, thus to agreements between undertakings operating at the same level of production or distribution, and to agreements between undertakings at different levels of production or distribution. According to Article 3, the provisions in respect of the agreements between undertakings shall also apply to decisions by an association of undertakings, and to concerted practices. Article 5(2) contains a list of typical examples of restrictive agreements.

Sanctions for conclusion of a prohibited agreement are of a penal and civil nature. According to Article 52 of the Act, a monetary fine shall be imposed on the undertaking for conclusion of such an agreement and, in addition, according to Article 5(1) such an agreement shall be null and void.

Exceptionally permitted restrictive agreements

Article 5(3) of the Act explicitly permits certain agreements falling under the prohibition within the meaning of Article 5(1), if these agreements (i) contribute to improving production or distribution of goods, or to promoting technical and economic progress, (ii) while allowing consumers a fair share of the resulting benefit (positive conditions). However, such agreements, decisions or concerted practices may not (iii) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (iv) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

This provision is applied through individual and block exemptions. In the case of individual exemption, the CPO may assess, upon application by one or more participating undertakings, the compatibility of an agreement with the provisions of Article 5(3). If it falls within Article 5(3), the CPO will grant an individual exemption by decision, in which it shall specify the date of the entry into force of an exemption, its duration and the conditions for an individual exemption, as well as the possible obligations imposed on the undertakings. Block exemptions are dealt with in Article 9, which authorises the Government to specify by decree the categories of agreements referred to in Article 5(1) meeting the conditions from the Article 5(3). Agreements fulfilling the conditions determined in the decree on block exemptions shall not be notified in order to be granted a decision on an individual exemption.

Negative clearance

According to Article 8 of the Act, the CPO may confirm, upon application by an undertaking, several undertakings, or an association of undertakings, that on the basis of the facts in its possession, Article 5(1) has not been violated in respect of the relevant agreement. The negative clearance offers

undertakings a degree of legal certainty, since it assures them that their agreement can be carried out without any fine being imposed.

Restrictions of minor importance

The Act recognises the existence of agreements which, albeit falling under the prohibition of Article 5(1), have only a negligible effect on competition, by reason of the low market shares of the undertakings on the relevant market. These agreements defined in Article 6 as agreements of minor importance, are therefore exempted from the prohibition of Article 5(1). This provision shall not apply where the competition in respect of the relevant product is restricted due to market circumstances, or when the undertakings enter into one of the agreements listed in Article 6(5).

Appraisal of restrictive agreements in 2000

In 2000, the CPO initiated 2 proceedings with regard to prohibited restrictive agreements. Both were initiated *ex officio*. In the first case the CPO issued a decision by which the existence of a prohibited vertical restriction was established. In this case, the CPO filed a proposal to a judge of misdemeanours for the imposition of a monetary fine. In the second case the procedure had not been concluded by the end of 2000.

The CPO was, in addition, assessing 6 requests for individual exemption, 5 of which were requested before the Decree on Block Exemptions entered into force. Individual exemption was granted in 5 cases, while in 1 case the procedure had not been concluded by the end of 2000. The CPO received 3 requests for negative clearance. In 2 cases the negative clearance was granted, and in 1 case rejected, since the CPO established that the notified agreement formed a prohibited vertical restrictive agreement.

Summary of selected cases

AS MERX d.o.o – Gasilska oprema d.o.o

The subject matter of the proceeding in this case was the appraisal of two standard-form contracts concerning the maintenance of fire extinguishers, between Gasilska oprema as the importer of fire-fighting equipment on the one hand and the maintenance services on the other. One of the contract provisions restricted maintenance services in the expansion of their service to other competitive products of another importer without the prior written consent of Gasilska oprema, except for products they were already maintaining at the time of the conclusion of the contract. AS MERX requested CPO to determine that Gasilska oprema had abused its dominant position in the market of fire extinguisher maintenance and that the contested provision of the contract forms the prohibited restrictive provision. The CPO found out that Gasilska oprema had not abused its dominant position, since it had never turned down any other importer of fire-fighting equipment nor had any undertaking asked for a consent. Nevertheless, as the CPO found, the contested provision represents a restrictive provision, falling under the Article 5(1) prohibition, since such a restriction is not a *conditio sine qua non* for assuring the quality of fire extinguisher maintenance. Maintenance services are namely supervised by the Inspectorate of the Republic of Slovenia for Protection against Natural and Other Disasters (Inšpektorat RS za varstvo pred naravnimi in drugimi nesre•ami), and, in addition, authorisation for maintenance of fire extinguishers may be withdrawn by the same body. Since the CPO determined that the provisions of the agreement fell within the scope of Article 5(1), it refused the request to issue a negative clearance made by FFE.

GIZ Suma 2000

The subject matter of the procedure was the assessment of a contract establishing Economic Interest Group Suma 2000. Members of this association are trading companies dealing with daily consumer goods. One of the objects of the contract was to create uniform business conditions in the buying market and the introduction of joint purchasing, which resulted in restricting the competition inside as well as outside this association. The members of the Group were also planning to introduce joint development. In its request for obtaining an individual exemption Suma 2000 pointed out that the establishment of Economic Interest Group represents only a transitional phase toward the formation of a holding company. After close examination of the contract and the market situation in the daily consumer goods market, the CPO established that the conditions of Article 5(3) are fulfilled and that an individual exemption can be granted. In the view of the CPO, rationalisation of operations, and the concentration of purchased quantities will improve the distribution of goods. As a result, better operating conditions achieved by the members of the association at suppliers, will be passed indirectly on to the consumers, which will result in lower retail prices. At the same time, the individual members, in spite of their involvement in the association, will keep their own sales, development and investment policy. Taking into account the position of the members of the Economic Interest Group on the relevant product market, they are unable to eliminate competition in respect of a substantial part of the products in question. CPO has therefore exempted the contract for the period of 3 years.

Lek d.d. – Sanofi-Synthelabo

Lek had notified to the CPO a contract on a joint venture concerning the establishment of a joint undertaking for the purpose of production, registration, promotion and sale of the products set forth in the contract, within the territory of Republic of Slovenia and some other ex-Yugoslavian markets. Lek notified the contract within the procedure on appraisal of concentrations. The CPO established that because of the nature of the contract, it should be considered as a restrictive agreement and that therefore a request for individual exemption should be filed. The purpose of the contract was the establishment of an undertaking between potential competitors, having as its object the performance of mainly commercial functions (co-operative joint venture). The CPO determined that the conditions for individual exemptions are met, and it therefore granted an exemption for a period of 15 years (also in accordance with established practice of the EU Commission).

Alpe Air d.d.o – Laus Air d.d.o

The CPO had assessed on request a contract on business and technical co-operation between two air carriers, operating on relevant markets of passengers and cargo transportation. Within the procedure the CPO established that their joint market share on each relevant product market is less then 5 %. The object and the effect of the contract was purely in achieving the technical improvements, namely technical co-operation. As a result, a decision on negative clearance was granted.

4. ABUSE OF DOMINANT POSITION

Prohibition of abuse of dominant position

According to Article 10 of the Act the abuse of a dominant position in the market is prohibited. As is apparent from the wording of this Article, a dominant (or even monopoly) position in itself is not prohibited. An undertaking enjoys a dominant position in the market when it can act to an appreciable extent independently of its competitors, customers and the final consumers of its goods or services. According to Article 10(3) an undertaking is deemed to have a dominant position in the market if its share

of purchasing or selling goods or services in the Republic of Slovenia exceeds a 40 per cent threshold. The Act takes into account the possibility that two or more undertakings enjoy joint dominance in the market. This is the case when no significant competition exists between them, and when their aggregate share of purchasing or selling goods or services in the Republic of Slovenia exceeds a 60 per cent threshold. The threshold criteria serve only as the basis for an overall competition analysis with a view to determining the (economic) power of the undertaking or undertakings concerned. The market share represents an important, but not exclusive criterion for determining the dominant position in the market. According to Article 10(2) other factors should be take into consideration, too, such as the degree of competition in the market, financing possibilities, possibilities for purchase and sale, and entry barriers to the market. The competition rules prohibit the abuse of a dominant position and confer on a dominant undertaking an obligation to restrain from any practices which restrict or prevent competition in the market without justifiable reason. The Act does not define the notion of abuse but only enumerates certain abusive practices. The list of those practices is not exhaustive.

Exemptions from the Article 5(1) prohibition with regard to restrictive agreements may be granted, as previously mentioned. However, they cannot be granted in the case of abuse of a dominant position. The prohibition is therefore of an absolute nature.

Negative clearance

According to Article 10(6) an undertaking may request from the CPO a negative clearance confirming that it has not violated the competition rules applying to the prohibition of abuse of a dominant position.

Appraisal of abuses of dominant position in 2000

In 2000, the CPO dealt with 9 cases of abuse of dominant position. 3 of the cases were initiated in 2000, while the others had been initiated previously. The procedures initiated before the Prevention of Restriction of Competition Act entered into force are dealt with in accordance with the provisions of the Protection of Competition Act.

Summary of the case AMB d.o.o. – Telekom Slovenije d.d.

In 2000, the CPO issued a partial decision in case 3073-5/99, ABM v. Telekom Slovenije (ISDN 3000). Telekom Slovenije, which holds a legal monopoly in the market of fixed voice telephony started to offer services of ISDN technology in the form of the ISDN 3000 package. ISDN 3000 consisted of public monopoly services as well as services of a commercial nature (internet access services). ABM addressed to Telekom Slovenije an offer for business co-operation, asking Telekom Slovenije for inclusion of their offer of access to internet services into the new ISDN package. Telekom Slovenije rejected the offer of ABM. The CPO decided that the rejection by Telekom Slovenije was without justifiable reason. In the view of the CPO Telekom Slovenije abused its dominant position in the market of fixed voice telephony in the Republic of Slovenia by discriminating againstABM. Telekom Slovenija has filed a complaint at the Administrative Court. Judgement is still pending.

5. CONCENTRATION OF UNDERTAKINGS

Concentration under the terms of the Act

Provisions on concentrations under the Act include mergers, acquisitions and full-function joint ventures. Substantial rules are specified in the provisions of Articles 11 to 13, while the provisions of Article 36 to 41 define special rules of procedure.

Article 11 of the Act defines that a concentration of undertakings occurs when:

- two or more previously independent undertakings merge; or
- one or more persons already controlling at least one undertaking, or one or more undertakings acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings; or
- two or more undertakings create a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

For the purposes of this Act, control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

- ownership of the entire capital or of a capital interest;
- ownership or the right to use all or part of the assets of an undertaking;
- right or contract which confers decisive influence on the voting or decisions of the organs of an undertaking.

Article 11 (5) defines that a concentration shall not be deemed to arise where banks, savings banks, or other financial organisations or insurance undertakings, the normal activities of which include transactions and dealing in securities, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them or where investment management undertakings acquire a business interest in undertakings, provided that they exercise the acquired rights only with a view to preserving the full investment value and provided that they do not exercise influence on the competitive conduct of the undertaking.

The obligation to notify a concentration

Not all concentrations that correspond to the elements from Article 11 of the Act are relevant from a competition law perspective. The volume of the concentration should be taken into account. Article 12 defines that a concentration must be notified to the CPO by the participants in the transaction:

- if the combined aggregate annual turnover of all the undertakings concerned, including affiliated undertakings, is more than 8 billion tolars before tax in the Slovenian market in each of the last two years; or
- if all the undertakings participating in the transaction, including affiliated undertakings, jointly achieve more than 40 per cent of sales, purchases, or other transactions in a substantial part of the Slovenian market, with goods or services which are the subject of the transaction, or with their substitutes.

A concentration must be notified by the participants to the CPO not more than one week after the conclusion of the agreement or the announcement of the public bid, or acquisition of a controlling interest.

That week shall begin when the first of those events occurs. A concentration must always be notified by those acquiring control of another undertaking within the meaning of the provisions of Article 11 of this Act. The notification may be effected jointly.

Failure to notify

Failing to notify an intended concentration is sanctioned by Article 53 of the Act. A monetary fine shall be imposed on a legal person and the responsible person of a legal person for committing the misdemeanour of failing to notify an intended concentration to the CPO, or failing to notify such a concentration within the time limit.

The competencies of the CPO in the process of appraisal of concentrations

The CPO shall appraise concentrations within the meaning of this Act primarily with a view to establishing whether or not a threat of creating or strengthening of a dominant position exists as a result of which effective competition could be excluded or significantly impeded. Effective competition is determined by reciprocal market characteristics such as its structure, the behaviour of undertakings and of other participants in the market, and the effects of such behaviour. The effects of concentrations are analysed on the relevant product and geographic market. A high market share, however, does not always represent a disputable concentration, so the CPO appraises market share together with other competition parameters, such as the choice available to suppliers and users and the openness of the market for new entrances.

On the basis of the appraisal, the CPO issues the following decisions declaring:

- the compatibility of the concentration with competition rules (approval); or
- approval of the concentration provided that the undertakings concerned comply with the conditions imposed on them; or
- the incompatibility of the concentration with competition rules.

Appraisal procedure

The CPO must issue decisions relating to the prior notification of concentration within 30 days of the day of notification, unless it raises serious doubts as to its compatibility with competition rules. If the CPO finds that the concentration notified falls within the scope of the provisions of this Act and raises serious doubts as to its compatibility with competition rules, it shall issue an order to commence a procedure. In that case the CPO must take a decision within 90 days of the day it issued an order to commence the procedure.

Appraisal of concentrations in year 2000

In 2000, the CPO issued 39 decisions on the basis of notified concentrations. In 4 cases, the CPO established that the concentrations notified did not fall within the scope of the provisions of the Act. 31 concentrations notified were deemed to be compatible with competition rules, and in 4 cases, the CPO approved the concentration, provided that the undertakings concerned comply with the conditions imposed on them. In term of process of decision making, the CPO, on the base of a first phase procedure, issued 27 decisions within 30 days of the day of notification and in 8 cases, the CPO issued decisions of compatibility (or compatibility with attached conditions).

Problems faced by CPO in appraising concentrations

In appraising concentrations the CPO, recognised that a low level of familiarity with the rules of competition law existed among market participants in 2000. This is evident from failures to notify or delayed notifications of concentration and in a large number of incomplete notifications.

The unavailability of relevant data about companies posed the biggest problem for CPO, which hampered the analysis needed by the CPO to appraise the situation of the company in the relevant market. Where the information obtained by the form of notification was incomplete, the CPO was obligated to initiate the second phase procedure and collect the information from other participants in the market. On the basis of questionnaires prepared for competitors, suppliers or buyers of the company which involved in notification of concentration, the CPO obtained data about market structure (for the territory of Republic of Slovenia and for regions) and changes in market structure over previous years, about changes of prices and other conditions in the market, about the international competitive position of suppliers, opinions regarding the effects of concentrations on other market participants and about intentions for vertical or horizontal integration, existing barriers of entry etc.

The problem of collecting relevant information was in part resolved with the enforcement of the Decree Defining the Contents and Elements Required for the Notification Form for the Concentration of Undertakings. Participants in concentrations consequently became more familiar with the data, which is important for CPO's decision making. They are aware that correct and complete data result in an easier and earlier CPO decision. A tendency toward even higher interest and responsiveness from market participants has been observed in the context of co-operation during process of decision making.

However, there is still a low level of familiarity with competition law in the market and problems arise when there is a necessity to determine relevant market and calculate market shares. Thus, in the coming year, the educational role of CPO will become an important tool to achieve a higher degree of knowledge of competition law.

Concentration in 2000 by industrial sectors

Retail stores

The process of changing the market structure in retail stores activity, which started in 1998, has continued in 2000. The main issue related to concentrations in the relevant market of daily consumer goods. CPO issued 12 decisions concerning concentrations of undertakings, which operate on above mentioned market.

Mercator, a company which operates stores across the whole territory of the Republic of Slovenia, and which is the market leader in both retail stores and supermarket segments, has acquired several companies, including Povrtnina, Dolenjka, Posavje, Emona Merkur and Potrošnik in 2000. The changed market structure as a result of the above mentioned acquisitions by Mercator also affected other market participants in both vertical and horizontal directions. Consequently, these acquisitions led to similar activities in the sector of daily consumer goods and the alimentary processing industry. In the market of daily consumer goods a counterweight became evident in the form of the Economic Interest Group Suma 2000, which was founded by the companies Vele trgovina, Era, ivila Kranj, Koloniale Veletrgovina and Veletrgovina Potrošnik. Because of the intention of companies to merge into a holding company Suma in 2001, the CPO has decided to grant an individual exemption for the period of 3 years. Some companies that are members of the association Suma 2000 have acquired certain smaller companies

which operate in individual regions, the list includes Prehrana, Maxina, Preskrba, Korotan, Jamnica, Dolina, Dravinjski Dom and Gramis. Despite the integration and acquisitions undertaken by the Suma 2000 group, Mercator has been able to retain the leading position in the market. Foreign retail companies are major competitors in the relevant market, the largest is Interspar, and Leclerc entered the Slovenian market in 2000.

In the alimentary processing industry, the CPO appraised a concentration in the market of production of non-alcoholic beverages (Pivovarna Laško-Radenska) and a concentration in the market of dairy products (Ljubljanske mlekarne –Mariborska mlekarna). CPO expects that concentrations in the alimentary processing industry will continue through 2001.

Publishing and media

The first cases related to concentrations of companies in the book publishing sector arose in 2000. DZS, one of the biggest Slovenian book publishers, acquired a majority capital share in Zalo ba Obzorja and Tehniška zalo ba Slovenije, which represents a typical horizontal concentration in the narrower segment of publishing. Mladinska knjiga Trgovina acquired a controlling share in Mladinska knjiga Birooprema, which led to a concentration of their activities in selling books, school and office stationary and equipment.

CPO also appraised the concentration of the commercial television companies Produkcija Plus and Kanal A. Within the appraisal procedure, a deeper analysis of the situation in the market of electronic media on territory of the Republic of Slovenia was performed, above all an analysis of the market for selling TV programmes, in which both participants of the concentration hold a high market share. On the basis of data gathered from the appraisal procedure, the CPO concluded that the consequent reinforced position of commercial television on the market would not threaten efficient competition.

Other concentrations are to be expected in this sector in the near future, among book publishing and other media; especially with newspapers and magazines, radio, in short concentrations which have in common the mediation of information.

Chemical and rubber tire industry

Concentrations in the chemical industry started relatively late in Slovenia. Sava Kranj, the largest Slovenian tire producer, started its acquisition activity in 1999 and continued in 2000 by acquiring several trading companies and companies operating in the colours industry. In addition, Sava Kranj has also been a shareholder in two companies since 1997, which were founded together with the American multinational Goodyear.

Sava Kranj has reinforced its trading activity by acquiring a majority share in the trade and manufacturing company Guma Grosuplje and in Astra tehni•na trgovina Ljubljana in 2000, and so fulfilled its plans of acquiring trade companies to support its chemical activities.

Sava Kranj has also obtained control over the company Teol Ljubljana, to which it will offer support in technical, development and marketing activities for glue production, and over Color Medvode, which is one of the four biggest Slovenian producers of base colours, coats and lacquers. It is to be expected that other companies operating in the relevant market will merge in the coming years.

By the acquisition of the company SKB IP, Sava Kranj also expanded its activity to the real estate market in 2000 and by the acquisition of the company Golf and Camping Bled also to tourist activity. All of these activities have reinforced the power of the Sava concern.

6. INTERNATIONAL ACTIVITIES

Activities for accession to the EU

According to the negotiation commitments with respect to Chapter 6 – competition and state aid, and obligations arising from Article 65 of the European Association Agreement[8], the year 2000 was oriented to intensive activities furthering the readiness of Slovenia to join the European Union.

The negotiating position on Chapter 6 encompasses the protection of competition (anti trust), state aid and state monopolies of a commercial character and the field of specific and exclusive rights. Preparation and co-ordination of additional clarifications to the negotiating positions, was one of the key steps taken in 2000 in the process of provisional closing of this chapter.

With the European Association Agreement, Slovenia has undertaken to:

- deal with the restriction of competition in the same manner as in the EU, i.e. in accordance with Articles 81, 82 and 87 of the Treaty of Rome, as renumbered by the Treaty of Amsterdam,
- adopt corresponding implementing rules,
- assure the compatibility of national legislation with the European Union Acquis, including the field of competition law.

Implementing rules for the application of the competition provisions applicable to undertakings were adopted by the Association Committee by the end of 2000 and they came into force on 1 January, 2001. With the passing of these rules the, conditions have been established for active as well as institutional co-operation between the competent authorities of the EU and the Republic of Slovenia.

Within the framework of accession negotiations, specifically in the field of preparing negotiation and other documents, there was co-operation and harmonisation in the following fields of activities:

- Preparation of Slovenia's Report on the Meeting of Commitments Arising from Negotiating Positions
- Screening update for Chapter 6,
- Preparation of the document Implementation of Commitments Arising from the Negotiating Position for Chapter 6,
- Preparation of a substantive basis for the Regular Report on Slovenia's Progress towards Accession for Chapter 6.

International conferences

The implementation of a competition policy as implemented in the EU, imposes broader obligations and competencies on the CPO than it had in the past. To carry out those obligations and competencies, international co-operation and specialisation is necessary in order to follow up the current changes in competition policy and monitor the actual legislation itself.

[8] European Agreement Establishing an Association Between the European Communities and Their Member States, Acting Within the Framework of the European Union, of the One Part, and the Republic of Slovenia, of the Other Part, Official Gazette of the Republic of Slovenia, No. 44/1997.

In 2000, international co-operation was conducted within the framework of the following activities and international organisations:

- Participation in the Expert Meeting on the Impact of Anti-Dumping and Countervailing Actions within the Framework of UNCTAD (Geneva, Swiss),
- International Conference on Competition Policy (Warsaw, Poland),
- Symposium Different Stages in the Competition Policy Development of the Countries in the Region – organised by the German Office for Competition Protection (Bundeskartellamt), the CPO and the Stability Pact (Ohrid, Macedonia),
- 6th Annual Competition Conference between Candidate Countries and the European Commission (Tallinn, Estonia),
- EC Merger Control: 10th Anniversary Conference (Brussels, Belgium),
- Regional Competition Policy Conference – organised by UNCTAD (Kiev, Ukraine),
- Participation in the working group Interaction between Trade and Competition Policy (Geneva, Swiss)
- Competition Conference / European Competition Day (Lisbon, Portugal),
- 2nd meeting of Association Committee (Brussels, Belgium),
- Working meetings and expert co-operation with the European Commission representatives – DG Competition (Brussels, Belgium).

Specialisation and training of officials

The CPO has been employing different forms of technical aids, in particular the horizontal (multicountry) PHARE programme, in the field of competition ever since its foundation. This programme is designed for training of accession countries' officials. The same emphasis was noted in bilateral technical aids for the year 2000.

In the field of bilateral co-operation with France, a working visit of a competition expert from the French office for competition protection (DGCCRF) was realised. The purpose of the visit was to communicate and explain practical past experiences of implementing competition legislation in France.

In the field of traditional bilateral co-operation with Germany (realised through the Transform programme), there were several expert meetings with German competition experts. In addition, a one week specialisation course was organised in the German office for competition protection (Bundeskartellamt) for a CPO official.

Training took place within the following specialised programmes, seminars and workshops in the field of competition protection:

- OECD Seminar on Topics in Competition Policy (Vienna, Austria),
- WTO Regional Seminar on Rules on Antidumping and Countervailing Actions (Vienna, Austria),
- Seminar/Workshop Competition in the Telecommunication Sector and the role of National Regulatory Authorities (Brussels, Belgium),
- Seminar on Competition Law, organised by the Croatian Agency for Protection of Market Competition, Federal Trade Commission and US Department of Justice (Zagreb, Croatia).

7. DUMPING AND SUBSIDISED IMPORTS

On the basis of the still valid provisions of the Protection of Competition Act, the CPO performs technical tasks within the scope of procedures referred to in Decree on Dumped and Subsidised Imports.

This decree defines the procedures and methods of determining the existence of dumped or subsidised imports, the existence or threat of material injury that may be caused by such imports as well as the methods of collection of anti-dumping or countervailing duties.

On the basis of the notification of a Slovenian turkey meat producer, a representative of the Slovenian domestic industry, CPO initiated an anti-dumping procedure regarding the import of turkey meat – fille from the Republic of Hungary. The investigation, which included the period between 1 July, 1997 and 30 June, 1998, showed that the turkey meat was not imported into Republic of Slovenia at a price lower than its normal value. On that basis the procedure was closed in 2000.

PRICE CARTELS AND BID RIGGING

Andrej Plahutnik

Competition Protection Office
of the Republic of Slovenia

Intoduction

Competition is the basic element of a market economy, the level of competition is a reflection of the development of an economy and as there is no perfect economic system there is no ideal competition. It would not be realistic to expect ideal competition, but it is realistic and necessary to raise the level of effective competition, to reach the situation in which competition is the best regulator of the market, the situation in which competition authorities would exceptionally intervene.
There are different kinds of competition distortions, sometimes certain types of distortions are more likely to happen than others, depending on (among others) economic situation, the level of the market development etc.

This presentation focuses on different competition distortions (especially definition of minimum prices and bid rigging) in an economy in transition, with special regard to respond of the players on the market to economic development and liberalisation of such economy.

Competition distortions

In the past, certain economic systems were considered to be self-sufficient and markets were regulated by state authorities and dominated by monopolies. Competition was more an exception than a rule.

With political and economic reforms competition was introduced, the market as such began to play the role. Entry barriers have been removed and better conditions for effective competition have been created and subsequently followed by certain changes of competition distortions.

The reflection of less developed economy is usually seen through number of different abuses of a dominant position of the companies on the market. Sometimes a dominant position is a result of less developed competition, sometimes it is a result of a legal monopoly. In such situation the companies having a dominant position are (usually) not forced to optimise their businesses and they are only exceptionally able to face effective competition.

With the introduction of competition, companies holding a dominant position or even a monopoly are faced with a totally different situation according to which they have to compete on a market, they have to care about the costs, they have to change their business philosophy. Sometimes they succeed, sometimes they do not. Sometimes they are still significant market players, sometimes they lose the game.

In certain, especially sensitive sectors like the sector of electricity, telecommunications etc. introduction of competition, affects the so called “national champions”, sometimes one company is divided into several new ones, former colleagues become competitors.

Situation has been changed not only on a horizontal level, significant changes have happened also in vertical relationships, the customers expect better products and services, more value for their money, because they have the possibility and right to choice.

A situation of suppliers is different, usually they compete, good becomes better, innovative element of competition becomes very important. Not all companies are able to follow new challenges, not all of them are willing and able to do so, not all of them are willing to compete.

Some of them rather decide to create the market together with their competitors according to their ideas; they decide how to define prices, how to share the market, they simply decide to exclude competitors. Instead of going for effective competition they decide to limit competition, they regulate certain markets by themselves, they are not forced to optimise their businesses, they are gaining excessive profits on a short-run, on a long-run they do not establish the necessary competitiveness, they exclude the basic element of an effective market economy- competition.

The black scenario can bring us from one non-effective market system to another of the same type. Competition was in the past limited by authorities and when the market was liberalised it might be limited by cartels. The result is obviously the same, there is no competition on the market.

Certain type of price cartel

Especially in economies in transition price regulation for certain goods and services has often been used as a tool to provide citizen with necessary goods and services at a reasonable price in comparison with common economic situation.
Price regulation, once determined by the state, is sometimes replaced by price determination by a cartel.
In the past, state determined maximum prices, nowadays cartel members tend to agree on minimum prices.

Cartel members find different excuses (when such cartel is detected) for agreements on minimum prices, one of the usual excuses is that the definition of a minimum price excludes unfair competition.

Minimum prices are defined in different ways, sometimes as selling prices and even brought into the price lists, sometimes certain elements of the prices are agreed so that the selling price may not vary significantly.

Cartel members try to explain that certain goods, but much more often services, can not be provided under certain price, that is usually thoroughly calculated by a cartel. They try to explain that selling under the set minimum prices would be an unfair trading practice and their usual explanation is that the selling under the set minimum prices would be a selling under the normal price and such prices (i.e. under the price, determined by the cartel members) would not cover all the costs and would be possible only when such competitor would not follow the law; usually grey economy elements are pointed out.

One of the statements that is quite usual is that cartel members are not able to provide certain goods or services under certain price what is especially significant. Instead of identifying and removing the problems in their business process they set a standard price that is a reflection of their (an)ability and not the reflection of the market. To a certain extent such approach is understandable (but far away from acceptable) because in the past in certain economies the companies need not apply all economic elements and need not make the best price calculation, because the price was determined (regulated) by the state.

What makes a lot of thorough is the following: hard-core cartels that agree on minimum prices are often established as business associations under the chambers of economies and deem the minimum price definition as normal, being in conformity with the law, preventing from unfair competition, providing customers good product and/or service. In the majority of cases they are able to condemn competitors that do not follow cartel decisions as the ones breaking the law, they adopt certain measures against them, sometimes such companies are excluded from such business associations. Not rarely, they can even count on public support.

The real problem is not as much in the reactions of the cartel members, problem is much deeper. Cartel members, sometimes organised as business associations, understand such approach as normal. As there is almost only the competition authority that do not accept such excuses, it could be said that a non-appropriate level of competition culture and general level of awareness, based on certain questionable experience, create circumstances for the existence of such cartels; it is very usual, but far from understandable and acceptable, that such cartels are organised as associations under chambers of economy.

Bid rigging (collusive tendering)

Introduction of competition brought changes to the field of government/public procurement, too. Instead of direct contracts between the government and its bodies as well as bigger companies on one side and the in advance chosen supplier on the other side for certain substantial purchases, the purchasers tend to call for bids in order to get the best price/quality ratio of certain goods and/or products.

Government/public procurements open a new dimension for market players. Contracts concluded under the said frame are very interesting because there are certain elements granted that are not always so clearly defined and secured as under such procurements; especially financing is very important and usually the planning of the production facilities is much easier and there is a lot of playground for other business operations and marketing activities, when certain (substantial) part of production (service) facilities is firmly engaged in advance.

Gaining a contract under an open bid is not only a challenge, it is a very good result, usually deemed to be reached in a fair game and it can provide a certain economic stability for a winner.
The original idea of a public procurement philosophy is very probably two-fold: on one hand the customer can get the best price/quality ratio and on other hand the products and/or services would be provided by the most competitive bidder.

Unfortunately, that is not always the case. Especially contracts (bids) that represent high value or can be executed over longer period of time, can be a subject of an anti-competitive behaviour.

As substantial contracts are awarded to companies that can prove that they are able to provide requested goods and/or services under determined quality in a certain time frame and under very strict demands of a customer etc., the number of potential bidders is already limited.
Not all competitors are able to bid, according to different reasons, some of them can not present requested references, which could be very important for a customer in order to feel secure to get requested goods and services on time, in a proper quality, over a longer period of time, some of them are not able to organise their facilities according to requests in a bid, some of them are even not able to provide bid bonds or performance bonds etc.

Potential bidders (or better: potential competitors) can be competitors but it is not necessarily always the fact. As the number of competitors can be pretty known in advance, the chance of having collusive tendering is not to be excluded in advance, especially when there are bids for contracts over a longer period of time. Especially civil engineering and construction and other investments into infrastructure as well as long term supplies of commodities can be severely affected in economies in transition.

The reasons why bid-rigging can happen are different; economic interest was already pointed out, but there is also another important reason: in a new situation potential competitors are still not aware of the fact that they should compete, they rather agree on taking agreed piece of the pie, because still non-appropriate level of competition allows them to do so.

Bid rigging can have local as well as international dimension, it depends on the industry and the scope of a bid as well as on entry barriers to certain markets.
If a market is still restricted, local competitors tend to agree among themselves how to define “fair” shares on a long term.

If a market is open for full competition, for new entrants, local competitors tend to agree how to exclude new entrants, how to split the pie among themselves, sometimes unfortunately backed by hidden technical barriers to trade provided by a state, not being aware that a harm is done to the same backing party, a state.

Sometimes, so called national consortiums between potential competitors can be established in order to control series of bids, and the so called national interest could be pointed out (but hardly properly explained) as an excuse.

Bid rigging is harmful especially due to the following (among others):

- cartel members exclude potential competitors in advance, not allowing them to enter the market (and they can do so, because they control the market over a longer period of time and they can offer the prices that are always more competitive than prices from independent bidders)
- cartel members exclude competition between themselves, because they agree in advance about the market sharing, about the prices, about other competition parameters that represent basis for competitiveness
- cartel members do not respond to demands of the market completely, they change in a way demands of market, they can artificially create new demands; they can even create different demands over agreed limited supplies, different prices, even different technical standards
- prices may not necessarily be a result of economic calculation but an agreement of bidders (cartel members)
- as government (public) procurement may represent important part of budget resources, bid rigging can have negative macro-economic effects on national economies
- the intention of government (public) procurement is to introduce competition to a very important and sensitive fields which can affect all sectors of economy and which aim to a better price/quality ratio; bid rigging is excluding all these expected effects
- instead competition as market regulator, cartel members (bid riggers) take over that role.

Conclusion

Hard core cartels are one of the most dangerous threats to competition, to market economy. Cartels are in certain systems, by certain undertakings still not considered as harmful as they are. That is perhaps due to the fact that competition is still a new category, not widely spread and known and that there is still a low level of competition, a low level of competition culture.

Competition advocacy is extremely important to raise a level of competition culture in each country, because proper awareness is a basis for a modern legal framework and successful implementation of an effective competition protection.

Co-operation between authorities, in the countries as well as on a multinational level can and shall bring us a progress in fighting cartels, and although there is a very simple rule - it is better to prevent than cure - we have to consider the importance of sanctions very thoroughly.
Substantial fines and even criminal sanctions may be considered as proper tools to fight cartels without unnecessary sympathies for cartel members.

Detecting cartels, demanding fines is our responsibility, our goal and we can do it better if we co-operate.

ANSWERS TO THE QUESTIONNAIRE ON ANTI – CARTEL ACTIONS

Since January 1st, 2000, two cases of hard core cartel have been assessed. The *first* involved major electricity producers, while the *second* involved two major cultural events organisers.

1. Respondent's name: *(all are producers of electric energy)*

- Dravske elektrarne Maribor d.o.o., Obre na ulica 170, Maribor;
- Savske elektrarne Ljubljana d.o.o., Gorenjska cesta 46, Medvode;
- Soške elektrarne Nova Gorica d.o.o., Erjav•eva ulica 20, Nova Gorica;
- Nuklearna elektrarna Krško d.o.o., Vrbina 12, Krško;
- Termoelektrarna Šoštanj d.o.o., Cesta Lole Ribarja 18, Šoštanj.

The relevant product market is the market of selling electric power, originated within Republic of Slovenia, to electrical energy customers which exceed a connected load of 41 kW at one take-off point and the parties engaged in electrical energy distribution activities (*eligible customers*). Eligible customers are allowed to choose their supplier of electric power freely. The legal framework for such design of the market comes from the *Energy Act (Ur. list, No.79/1999; hereafter referred to as EA)*. By virtue of Article 19 EA the supply of electric energy is a market-based service, i.e. the sellers and buyers of electricity are free to negotiate the amount and price of the supplied energy, unless the law provides differently. The third paragraph of the above mentioned Article defines eligible customers as electrical energy customers, which exceed a connected load of 41 kW at one take-off point and the parties engaged in electrical energy distribution activities shall be eligible customers.

As the application of Article 19 is restricted until January 1 2003 to the electricity generated on the territory of the Republic of Slovenia, the relevant geographic market is the national territory.

The above mentioned companies agreed to form a common offer for the selling of electricity to eligible customers (i.e. electrical energy distributors and electrical energy customers which exceed a connected load of 41 kW at one take-off point). The content of the offers to both groups of customers was equal for all the types of the offered power. The joint offer also embraced the terms of sales, which included prices, terms of payment and payment insurance. In addition, the electricity producers agreed to act in concert after the opening of the market. Termoelektrarna Šoštanj *(TEŠ)* was chosen as co-ordinator of actions among companies. In this way an organised form of co-operation for the common setting of competitive parameters between the involved companies, which operate in the same industry, has been established. Therefore the **evidence of collusion** was direct.

PENAL PROVISIONS:

Article 52 of Prevention Of The Restriction Of Competition Act implies the following penal provisions:

(1) A monetary fine from SIT 10,000,000 to SIT 30,000,000 shall be imposed on a legal person for committing the misdemeanour by:
- Concluding an agreement on restriction of competition (Article 5);
- Abusing its dominant position in the market (Article 10).

(2) A monetary fine from SIT 3,000,000 to SIT 15,000,000 shall be imposed on an individual performing independently in the market for committing the misdemeanour referred to in the preceding paragraph.

(3) A monetary fine from SIT 1,000,000 to SIT 1,500,000 shall be imposed on a responsible person of a legal person for committing the misdemeanour referred to in the first paragraph.

The Office had prohibited the agreement.

2. The most colourful statement revealing the intent of cartel members is the following.

Companies, which are involved in the cartel, said that preparations of electric energy producers to pending opening of the electricity market were running late, as they also found out that the openness of the market to the foreign competition causes many changes (contracts, rules which define the functioning of electroenergetic system, flow of information), so they agreed to form a common offer as electric energy producers for the period of transition. As the cartel co-ordinator put it: "*to make a rapid, temporary offer, by which the cartel will ensure uninterrupted functioning of electroenergetic system and operation of electric energy customers during the transition period"*. The co-ordinator also stated that there was no agreement about concentration or any other cartel agreement, which would influence the degree of competition in the market.

The producers on one hand denied any mutual cartel agreement, while on the other hand they admitted to go ahead with a common offer to eligible customers. The Office concluded that a group of independent companies that is jointly selling their product forms a price cartel, which is within the competition protection framework one of the most dangerous forms of restrictions of competition in the market

The second case involved two cultural events organisers.

1. Respondent's name:

- **Festival Ljubljana,** Trg francoske revolucije 1-2, Ljubljana;
- **Cankarjev dom, kulturni in kongresni center,** Prešernova 10, Ljubljana.

The relevant product market includes:

- market for renting out concert and other halls,
- market for renting out technical equipment and musical instruments,
- market for organising cultural, congressional and other entertainment events.

The relevant geographic market for all above mentioned product markets is the territory of Republic of Slovenia.

Undertakings Festival Ljubljana and Cankarjev dom were in breach of Article 5 (1) of Prevention of Restriction of Competition Act because the parties in the Agreement on mutual co-operation dated November 11th 2000 agreed the following:

- Each party of the agreement will inform each other on the organisation of events or they will try to prevent an event of any other organiser in the same week, when the other party has already planned the same kind of event.

- Festival Ljubljana and Cankarjev dom are accepting by this agreement the limitation of competition clause, which will be mutually respected. The acceptance of this agreement is a moral obligation to both parties in the sense that if one party will sign or put a significant effort in engaging a top artist or an ensemble, the other party would withdraw from any effort to engage the same artist before the performance takes place in Ljubljana.

One of the most colourful statement:

The parties are claiming that as companies serving the public interest being active in the field of culture, they cannot be undertakings in the sense of Prevention of the Restriction of Competition Act. Parties also claim that for their activities they receive significant budget resources, which demand rational usage, so competition rules do not apply to their activities.

Provisions of Prevention of the Restriction of Competition Act are binding for all legal subjects that engage in activities in the market against receiving payment. Cankarjev dom and Festival Ljubljana do engage in activities against payment in the market. The Office concluded that the agreement is in breach of competition rules, because the agreement exists between two parties about terms of market operations, which aims at preventing, hindering or deforming competition in Republic of Slovenia. The provisions of the agreement are therefore prohibited and void. The Office submitted the proposition to impose fines to the misdemeanour judge.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

03-Oct-2001

English text only

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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OECD Global Forum on Competition

CONTRIBUTION FROM SOUTH AFRICA

This contribution was submitted by South Africa as a background material for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

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CONTRIBUTION FROM SOUTH AFRICA

By ADV. MENZI SIMELANE
Commissioner : Competition Commission

I. – COMPETITION LAW AND POLICY IN SOUTH AFRICA

1. INTRODUCTION

The Competition Commission (Commission) plays a pivotal role in the development of the South African economy. It creates an environment where an efficient business sector can become internationally competitive and where small businesses can participate more effectively in the economy. Most importantly, it ensures that consumers can obtain the most competitive prices and a greater product choice.

The Competition Act, (Act No. 89 of 1998) was passed by Parliament in September 1998. Certain provisions of the Act came into effect on 30 November 1998 to allow for the establishment of the institutional framework. During the first five months of the financial year, the period from 1 April 1999 to 31 August 1999, the focus of the Commission was on the recruitment and training of staff, the completion and equipping of the building, the development of the necessary systems and the drafting of the procedural rules and necessary regulations. All of these activities ensured that the Commission was ready to commence operations, when the remaining provisions of the Act came into effect.

2. PURPOSE OF THE COMPETITION ACT

The purpose of the Competition Act is to promote and maintain competition in the Republic of South Africa in order to:

- promote the efficiency, adaptability and development of the economy,
- provide consumers with competitive prices and product choices,
- promote employment and advance the social and economic welfare of South Africans,
- expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic,
- ensure that small and medium-sized enterprises (SMEs) have an equitable opportunity to participate in the economy, and
- promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

3. FUNCTIONS OF THE COMPETITION COMMISSION

The main functions of the Competition Commission are to:

- implement measures to increase market transparency,
- implement measures to develop public awareness of the provisions of the Act,
- investigate and evaluate prohibited trade practices and grant or refuse applications for exemption,
- authorize, with or without conditions, prohibit or refer mergers of which it receives notice,
- negotiate and conclude consent orders, and
- ensure consistent application of the Competition Act across all sectors.

4. MERGERS AND ACQUISITIONS

During the period 2000 to 2001, the Commission was notified of 407 mergers, which included 24 large mergers, 387 intermediate mergers and 3 small mergers. The small merger category only came into effect on 1 February 2001 with the amended Competition Act, which accounts for the small number.

An intermediate merger : combined annual turnover or assets of the acquiring firm and the target firm are valued at or above R50 million; and the annual turnover or the asset value of the target value exceeds R5 million.
A large merger : combined annual turnover or assets of the acquiring firm and the target firm are valued at or above R3.5 billion and the annual turnover or the asset value of the target firm exceeds R100 million.

Of a sampling of the 285 merger cases finalised during the period April 2000 to February 2001, it was found that most of these mergers were horizontal, involving firms that competed in identical markets. Conglomerate type mergers constituted 22% of the total. Such mergers are notifiable if they involve a change in ownership and therefore require investigation. As a pure conglomerate merger entails no product overlap or vertical integration, it is not always clear if this type of merger would raise competition concerns. However, conglomerates may diminish competition through their various spheres of influence, and conglomerates might engage in cross-product subsidisation to gain an unfair competitive advantage.

Table 1: Comparison of merger activity between Sept 1999/Mar 2000 and Apr 2000/Feb 2001

SECTOR	% OF TOTAL (SEPT 1999 – MARCH 2000)	% OF TOTAL (APR 2000 – FEB 2001)
Mining and Construction	6%	4%
Financial Services	13%	6%
ICT	14%	11%
Transport	10%	4%
Manufacturing	22%	33%
Food and Beverages	5%	2%
Chemicals	5%	4%
Electrical Equipment	2.5%	3%
Paper and Packaging	2.5%	2%
Building Materials	4%	1%
Printing and Publishing	2.5%	1%
Equipment and Machinery	-	5%
Metal Products	-	3.5%
Transport Equipment	-	3.5%
Textiles and Fabrics	-	3%
Other Manufacturing	-	5%
Services	13%	11%
Real Estate	4%	8%
Wholesale [1]	-	12%
Retail	-	6%
Other [2]	18%	5%
TOTAL	100%	100%

This table reflects a significant increase in the proportion of mergers taking place in the manufacturing sector. Within manufacturing, sub-sectors such as chemicals, electrical equipment, paper, packaging, printing, and publishing have not seen more than a 1% change in merger activity. However, some sub-sectors that did not feature in the previous sample study include equipment and machinery, metal products, transport equipment, textiles and fabrics.

While merger activity increased in manufacturing, it dropped in the Information and Communications Technology (ICT) sector and financial services. These two sectors together contributed more to merger activity than any other sector from September 1999 to March 2000, but have since fallen into second place with manufacturing now leading the way. This renewed interest in manufacturing may be due to waning enthusiasm for information technology on a global level. Nevertheless, ICT and financial services remain an important component of merger activity in South Africa and further consolidation can be expected in future.

1 Note: Finer divisions of wholesale and retail do not show persistent trends in any one sector. In the sample study covering September 1999 – March 2000 wholesale and retail would have been grouped under 'other'.

2 Other includes cases that are not significantly representative of particular sectors.

Due to the nature of case investigations, investigators worked and continue to work on a number of cases simultaneously. However, the average caseload per investigator, indicates that investigators in the Mergers Division had a caseload of approximately twelve and nine cases. This case-load is much higher than in other jurisdictions. For example, the average case-load of an investigator working in the Department of Justice in the United States seldom exceeds two cases at a time.

4.1 Case Overview

During the period under review, the Competition Commission prohibited three intermediate mergers and three large mergers, representing 0.78% of all intermediate and 12.5% of all large mergers finalised. Examples of cases investigated are annotated below:

4.1.1 Glaxo Wellcome (Pty) Ltd and SmithKline Beecham (Pty) Ltd

The Commission initially prohibited the proposed intermediate merger between Glaxo Wellcome (Pty) Ltd and SmithKline Beecham (Pty) Ltd on competition and public interest grounds. The transaction gave rise to competition concerns in respect of the private sector segments of the relevant markets identified, involving two therapeutic categories. These were Topical Antibiotics (D6A) and Anti-virals (excluding anti- HIV) (J5B).

The Commission's prohibition led to negotiations between the parties, the Commission and the Competition Tribunal. The parties agreed to the out-licensing of Polysporin, Cicatrin and Neosporin, which fell within the Topical Antibiotics (D6A) therapeutic class, on the terms and conditions set out in an undertaking. The parties also agreed to the out licensing of Famir, which fell within the Anti-virals (J5B) therapeutic class.

These two undertakings addressed the competition concerns. The parties also provided the Commission with an undertaking that addressed the Commission's concerns regarding public interest issues. The Commission recommended approval of the merger once the necessary remedies were effected. The Tribunal approved the merger once satisfied with the undertakings.

4.1.2 Tongaat-Hulett Group Ltd (THG) and Transvaal Suiker Beperk (TSB)

This merger posed special challenges for the Commission. The sugar industry is heavily regulated with limited competition and limited incentives for competition.

4.1.2.1 The Current Regulatory Framework

The South African industry is regulated in terms of the Sugar Act, 1978, and the Sugar Industry Agreement 2000.

The Sugar Act allows for the incorporation of the South African Sugar Association (SASA). SASA administers the partnership between its two members, the South African Cane Growers Association and the South African Sugar Millers Association. It is an autonomous organisation and operates in terms of the Sugar Act and the Sugar Industry Agreement, first promulgated in 1936. The 22 members on the council of SASA represent the interests of both growers and millers. 11 SASA council members represent the 53 000 registered cane growers (Industry Directory 2000/2001) and another 11 SASA council members represent the 4 millers (which will become three). The four millers are Tongaat, TSB, Illovo Sugar Ltd and

Union Co-op Ltd. Union Co-op Ltd owns one mill and sells its sugar production through Illovo. Thus there are only three South African sugar producers actually selling to the domestic market.

In terms of the Sugar Act, the Minister of Trade and Industry may, after consultation with SASA, determine the terms of the Sugar Industry Agreement (Agreement). The Agreement shall provide for matters relating to the Sugar Industry, which are in the interest of the industry but not against the public interest.

The Minister may provide for and deal with, inter alia, the following issues in the Agreement:

- The regulation and control of the production, marketing and exportation of Sugar Industry Products;
- The prohibition of the production, marketing and exportation of Sugar Industry Products;
- A formulae for determining the price to be paid by millers to growers;
- The functions to be performed by the Association;
- The imposition of levies, etc.

The Act also allows for the determination of a maximum industrial price by SASA, at which any sugar product, other than specialty sugar, may be sold. The maximum price is also part of the formulae utilised in calculating the current import tariff.

The prominent feature of the Sugar Industry Agreement, 2000, Government Gazette No 21139, Vol. 419, is the division of proceeds. It is a formula through which revenue accruing from the sugar industry is allocated to the millers and growers as part of the partnership arrangement. Revenue is based on a notional calculation reflecting anticipated industry income, not real income. The notional price (the price attributed to brown sugar, refined sugar (white) and molasses) is determined from time to time by SASA. Net proceeds from both domestic sales and exports are calculated and allow for the allocation of net divisible proceeds between millers and growers in a specific ratio (63% for growers and 37% for millers).

SASA also determines the quantities of sugar required for the local market and the export market. This entails allocating a quota to each mill, which states the amount of sugar that can be sold domestically and the amount that must be exported. Millers are allowed to sell more than the allocated quota on the domestic market. However, if they do, they must pay back to SASA an amount equal to the difference between the profit from selling on the domestic market and the profit from selling to the export market for redistribution amongst those mills, which have sold less than their allocated quotas.

The provisions of the Sugar Act are further supported by the tariff regime adopted by the Department of Trade and Industry through the Board on Tariffs and Trade. The tariff adjusts automatically to the world sugar price in order to maintain the maximum tariff allowable under the GATT rules. In interviews with the parties, reference was made to the “two pillars” of the tariff policy – a “reasonable” tariff to keep out sugar at the distorted world market price (“distorted” because of the subsidies to the exporters of sugar), and the equitable sharing of the benefits of the tariff. The maximum domestic price for sugar also automatically adjusts with the tariff, so as to remain just below the price of sugar imports.

The net effect of the policy instruments is that the tariff essentially operates as a price-setting mechanism, and the “equitable sharing” essentially operates as a volume allocation mechanism. As there is

little incentive for millers to increase the amount that they sell in the domestic market, there is little incentive for them to initiate price competition with each other and the "maximum" price, set by SASA, therefore essentially becomes a minimum price. The current regulatory framework thus creates very few incentives for competition between sugar producers.

During its investigation the Commission received written assurances from the Department of Trade and Industry (DTI) that it did intend to revise the Sugar Act of 1978, to implement measures which would promote rivalry in the domestic sugar industry. The Commission considered the effect the merger would have on competition in the existing relevant market as well as potential future competition and recommended to the Competition Tribunal that the proposed merger be prohibited for the following reasons:

The market was already concentrated and concentration levels would increase further.
The proposed merger would have also facilitated a split between THG (direct consumption) and Illovo (industrial sales).

Although there was limited price and non-price competition, the Commission was of the opinion that the merger would substantially lessen any competition that existed at that stage. This was largely in respect of non-price competition but significantly contributed to competition.

The high levels of concentration and possible negative effects thereof on competition would not be offset by any balancing factors such as competition from imported sugar, low barriers to entry, or significant countervailing power.

Customers perceived TSB to be the "maverick" in the industry, and that an effective competitor would be removed, especially considering the DTI's endeavours to make the domestic industry more competitive.

4.1.3. Joint Venture between Shell SA (Pty) Ltd, BP Southern Africa (Pty) Ltd, Caltex Oil (SA) (Pty) Ltd and Trident Logistics (Pty) Ltd

On 15 December 2000, the Commission submitted its recommendation to the Tribunal to prohibit the proposed supply and distribution joint venture between Shell SA (Proprietary) Limited (Shell), BP Southern Africa (Proprietary) Limited (BP), Caltex Oil (SA) (Proprietary) Limited (Caltex) and Trident Logistics Proprietary) Limited (Trident). On 22 January 2001 the parties withdrew their application from the Tribunal. In light of this withdrawal, the Competition Commission's recommendation to prohibit the proposed joint venture remains in force.

The proposed transaction involved the consolidation of certain services and assets of three major oil companies in South Africa, i.e. Shell, Caltex, and BP. Through the joint venture, the three parties would form Trident, to manage, contract, and provide logistical services on their behalf. Trident would provide these services with respect to supply and distribution, including services associated with refining, storage, and handling at depots, pipeline, rail, ship, and road transportation.

The proposed merger would substantially have lessened competition between the parties. More specifically, the Commission believed that it would have had the effect of substantially lessening competition in the markets for product exchange and hospitality services.

Refiners enter into agreements with other refiners, called product exchange agreements, as an alternative to producing the product themselves. Through the agreements, the refiners may exchange product or pay cash for product. However, the majority of transactions, both by volume and value, are

settled in product rather than in cash. These agreements allow them to receive product in areas where they may have shortfalls and give product in areas where they have surpluses. This helps cut down on uneconomical and unnecessary transportation throughout the country.

The owners of the crude refiners have longstanding product exchange agreements with each other, essentially *to reduce the cost of product transportation.* These exchange agreements are between the four crude oil refineries in Durban (Shell/ BP and Engen), Cape Town (Caltex) and Sasolburg (Sasol/Total).

For example, there is a Durban/Cape Town product exchange agreement between Caltex, Shell, BP and Engen. In terms of that agreement, the parties communicate their requirements for products in the Cape Town and Durban product markets. As far as possible, Caltex supplies the Cape Town market requirements of Shell, BP and Engen. These parties deliver equivalent products to Caltex in Durban to meet Caltex's requirements for the Durban area and the hinterland. The effect is that each party saves the transportation cost of delivering the product volume in question between Durban and Cape Town. That saving is shared equally between the two parties having exchanged products.

Like product exchange agreements, hospitality agreements are mainly entered into for efficiency reasons. The main savings resulting from hospitality agreements are:

i) A reduction in depot numbers, and

ii) The transport cost savings.

These services are thus offered both for convenience and to save costs. To minimise distribution costs, the major marketers of petroleum products have entered into hospitality agreements on a case-by-case basis at various depots. These arrangements are common worldwide and have been in place for decades. Hospitality arrangements are willingly entered into between oil companies.

Invariably hospitality agreements are recorded in writing. Generally these agreements have six months or greater notice of termination periods.

The essence of a hospitality agreement is that a depot operator (e.g. Shell – the operator) agrees to provide another oil company (e.g. BP – the guest) with product at a Shell depot (e.g. Ladysmith). The purpose of these negotiated agreements is to save the cost of duplicating facilities in the same vicinity. Both host and guest benefit from economies of scale.

Insofar as hospitality involves a product exchange (i.e. it is not settled in cash) this is referred to as a *"borrow/loan" arrangement*. In the above example Shell is deemed to have loaned Shell product to BP and BP is deemed to have borrowed that Shell product from Shell. The borrow/loan balances are settled either by the guest placing product into the depot in advance or by repaying in product, either at the depot or at the coast.

In addition to settling the loan with product the guest would pay the host:

- The primary transport cost of delivery from coastal refinery to the depot (normally the zone differential), if applicable; and

- An agreed rate for storage and handling; and

- An agreed rate for delivery to customer, if applicable.

The requirements for participation in hospitality and product exchange arrangements are:

- Storage facilities;
- Transport facilities; and
- A supply of product.

The joint venture, in the Commission's view, would also essentially reduce the incentives for vigorous future competition, once momentum was given to the deregulation of the industry. Furthermore, no efficiency, technology or other pro-competitive gains would result from the joint venture that would outweigh or offset the potentially anti-competitive effects. The Commission found that the parties had failed to demonstrate which efficiencies were unique to the merger as opposed to gains that the parties would achieve without the joint venture. More importantly, they had failed to convincingly show that the efficiencies would benefit consumers in any manner. The Commission, therefore, was of the view that the parties had failed to demonstrate that efficiency gains that arose from the proposed venture outweigh the potential anti-competitive effects of the proposed venture.

The proposed joint venture also raised certain public interest concerns, specifically regarding employment and empowerment issues, within the context of the oil industry and the overall restructuring vision of Government. While the merger would benefit the parties in terms of one time cost savings, it would not contribute to the overall competitiveness of the South African oil industry.

One of the eleven cornerstones of future government policy on the liquid fuels industry is that black economic empowerment should be reflected in the composition of the industry at all levels, and significant domestic black ownership, or control, in all facets of the industry.

The aim of competition legislation is not to protect competitors, but the competitive process. The effect of the proposed transaction on empowerment firms in the liquid fuel industry raised concerns within the context of the broader aims of the legislation, i.e. ensuring small and medium-sized enterprises have an *equitable opportunity* to participate in the economy, and the promotion of a greater spread of ownership, in particular the ownership stakes of historically disadvantaged persons.

The oil industry needs storage facilities to facilitate the economic movement of product from refinery to end consumer. Access to these facilities is particularly important to the BEE companies. The smaller, empowerment firms in the liquid fuels market are dependant on the other industry participants for both product exchange services and hospitality services, since they do not own any refineries or depots themselves. Similarly, access to these facilities and services would be crucial to any future new entrant into the industry. Within this context, the Commission found that the proposed joint venture would not facilitate the achievement of the proposed empowerment goals of Government and, furthermore, would not contribute to an overall competitive industry.

After due consideration the Commission concluded that there were no mitigating factors that would lessen the anti-competitive effects of the joint venture and also no public interest grounds on which the venture could be approved.

5. ENFORCEMENT AND EXEMPTIONS

The Competition Commission is required to investigate alleged contraventions of Chapter 2 of the Competition Act. Chapter 2 of the Act deals with restrictive horizontal and vertical practices and the abuse of dominance. The Commission must investigate all complaints submitted to it, and may initiate a complaint in cases where a reasonable suspicion of an alleged contravention exists.

During the period 1 April 2000 to 31 March 2001, the Commission dealt with about 176 complaints, of which 123 (69.9%) were resolved and 53 (30.1%) are still being investigated. Twenty-eight of the cases under investigation involved complaints alleging more than one contravention of the Act. Although there are only five cases with complaints pertaining only to contraventions of Section 5, Section 5(1) features in 18 of the cases involving multiple contraventions. Section 8(c), which relates to exclusionary acts by a dominant firm, features in nine of the 28 alleged multiple contravention cases. Section 4(1)(b)(i), regarding price fixing, arose in ten different cases.

The Act also makes provision in section 10 that a firm may apply to the Commission to be exempted from the application of Chapter 2 (the horizontal, vertical, and abuse of dominance provisions). This applies when either an agreement, or practice, or category of agreements or practices meet the requirements laid down in section 10(3) of the Act.

It is incumbent on the applicant to show that any restriction or restrictions thus imposed on the firm(s) concerned is/are required to attain to any of the following objectives:

- the maintenance or promotion of exports;
- the promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive a change in productive capacity necessary to stop decline in an industry or the economic stability of any industry designated by the Minister of Trade and Industry after consulting the Minister responsible for that industry.

During the period 1 April 2000 to 31 March 2001, nine applications for exemption were lodged, all relating primarily to restrictive horizontal practices. Three applications pertain to activities of pharmaceutical manufacturers, two relate to healthcare services sector, and the remaining four applications are derived from companies involved in the manufacture of transport equipment, cement products, liquid fuels, and shipping lines. Four exemption applications were concluded by March 2001. Examples of cases investigated are annotated below:

5.1. Case Overview - Exemptions

5.1.1. South African Airways Limited (SAA) and Qantas Airways Limited (Qantas)

SAA and Qantas filed an application with the Commission for an exemption. The Department of Transport (Department) and the International Air Services Council (Council) are responsible for the regulation of international air services to and from the Republic of South Africa. The International Air Services Council has been created in terms of Section 3 of the International Air Services Act, 1993 (Act No. 60 of 1993). It is clear that the Department and Council have the responsibility to promote competition between air service providers. To this end, the Department endeavours to create bilateral air service

frameworks that provide for the designation of more than one airline, negotiate sufficient capacity to enable further airlines to introduce services, and to establish a flexible tariff filing system to encourage price competition between airlines.

The South African and Australian Governments have since 18 July 1985 discussed and agreed to arrangements in respect of the air services between the two countries. A code share agreement is currently in place, specifically regarding routes to be flown and their frequency.

The agreement also provides for block sharing and code sharing between the two airlines. "The designated airline(s) of South Africa may terminate services at Perth or Sydney, and may, at its option, serve any point or points of choice in Australia through joint service, blocked space, or code share arrangements with any Australian carrier; (while) the designated airline(s) of Australia may terminate services at Johannesburg or at other nominated points in South Africa, and may, at its option, serve any point or points of choice in South Africa through joint service, blocked space, or code share arrangements with any South African carrier."

The parties raised the question of jurisdiction, especially in relation to the Competition Act 1998, prior to the 2000 amendments coming into force on 1 February 2001. Since this exemption is granted for a period encompassing a period after 1 February 2001 and taking the comments above into account, the Competition Commission has concurrent jurisdiction. Both the Department of Transport and its minister support the agreement, clearly as being consistent with the objects of the IAS Act.

The application related to the granting of an exemption from Section 4(1)(b)(ii) of the Competition Act 1998 (the Act). The applicants specifically requested that their code sharing agreement on the South Africa-Australia route and other commercial agreements be exempted from the prohibition(s) contained in the Act. The agreement relates to a market sharing agreement between the parties.

The applicants indicated that there was a serious chance that SAA might exit the market, having made significant losses on the route due to, *inter alia*, fuel price hikes. It also pointed out that export earnings would be generated from the carrier's continued presence on this route.

Exemption was granted until 30 June 2002. This mirrors the period permitted by the Australian transport authorities. The approval of the application is subject to the following conditions that the parties need to comply with:

- During the period of the exemption, both parties to the agreements must independently submit quarterly reports, detailing the following:
- the actual highest and lowest fare charged over the period for all classes;
- the number of code share seats sold by each party on the other's services;
- the volumes of cargo, rates charged for cargo, and the revenue derived from cargo as well as any increase and/or decrease in the said value, sales, and revenue.
- The parties to the agreements shall not share or pool revenues with each other under the code share or commercial agreements.
- The parties to the agreements must each independently establish and determine their own tariffs and fares on the code share flights, and market these flights separately.

- The parties to the agreements must show how exports have been promoted or maintained in terms of both seat and cargo volumes during the period for which the exemption has been granted, before any new agreement or extension of the existing agreement will be considered by the Commission.

- Any amendment to the agreement shall not be of force and effect until approved by the Commission.

- Parties must add a clause to their agreements stating that the agreements are subject to the above-mentioned conditions, and in so far as there is a conflict on any term of the agreement between the parties on the one hand and these conditions on the other hand, the conditions shall prevail.

- Nothing in this exemption shall preclude the Competition Commission from initiating action against any party for implementing the various agreements prior to the issue of the exemption.

5.2 Case Overview - Enforcement

5.2.1 Scotprop complaint against Property Network

Scotprop a new estate agency filed a complaint against Property Network, an estate agents association in Kwazulu Natal. Scotprop alleged new entrants to the real estate market struggled to establish themselves as a viable alternative to the well-established market participants being members of Property Network. In order to survive as an estate agent, an estate agent has to be a well-established independent estate agent or a member of Property Network.

The CC accepted the submission and found the membership criteria of the participants in the Property Network to be restrictive.

The Commission submitted a recommendation to the Tribunal for the approval of a consent order and it was agreed that the existing membership criteria of the Property Network Participation agreement have to be expunged and substituted with a new membership criteria agreed to by the Competition Commission. These new criteria would not be restrictive and allow for easy membership to the Property Network.

5.2.2 D.J. Mine Services Pty Ltd complaint against Palabora Mining Company

In practically the first complaint lodged with the Competition Commission after it started operating on 1 September 1999, a small converter of vermiculite, D J Mine Services (Pty) Limited (D J Mine) objected to a sole distribution agreement that existed at that time between Palabora Mining Company Limited (Palabora), the only manufacturer of crude vermiculite in this country and Chemserve Perlite (Pty) Limited (Chemserve) a subsidiary of the publicly quoted company Chemserve Limited and a large converter of vermiculite. In particular the complainant objected to the fact that it had to purchase raw materials from its competitor. Moreover, the agreement permitted Chemserve to add on an allegedly large mark-up in its sales to smaller converters such as D J Mine. It was averred that the agreement contravened both sections 8(c) and 9(1) of the Competition Act 1998. During its investigation the Commission found that Palabora was dominant as defined in sections 6 and 7 of the Act and that it contravened the sections

referred to above. In terms of section 6 a firm is dominant if its assets or turnover exceed. Palabora agreed that it was in contravention of the Act and negotiated a consent order with the Commission to address the prohibited practice. The agreement was terminated which had the effect that all converters were able to source product directly from Palabora on a non-discriminatory basis. This consent order was confirmed by the Competition Tribunal on 18 May 2000.

5.2.3 Competition Commission complaint against Nutri-Health

During this year the Commission initiated an investigation into resale price maintenance by Nutri-Health International (Nutri-Health). Nutri-Health is an international company that specializes in weight management and nutritional products. It operates its business through network marketing and direct selling It employs independent distributors to sell its products.

In terms of section 5(2) of the Competition Act 1998 the practice of minimum resale price maintenance is prohibited. A suppliers or producer may recommend a minimum selling price to the reseller of a good or a service provided the supplier or producer makes it clear that the recommendation is not binding and if the product has its price stated on it, the words "recommended price" appear next to the stated price.

"Formula 2001" a weight management drug distributed by Nutri-Health stated the following on the package label: "Minimum selling price R91,00 per bottle". Although this price did not seem to be enforced in practice, the wording contravened the Act. Labels were changed and consent order negotiated with Nutri-Health.

6. COMPLIANCE

The Competition Act requires the Commission to implement measures to ensure market transparency and to develop public awareness of the provisions of the Act. Despite efforts to educate and inform the specific stakeholders and the general public about the provisions of the Competition Act, the levels of awareness and understanding are still low. To address the information needs of stakeholders, the education and information activities of the Commission aims to meet the following three objectives :

- promote voluntary compliance with the provisions of the Act by public and private enterprises;
- promote participation by public interest groups recognised in the Act in competition proceedings;
- build a public profile for the Commission.

In addition, the Compliance division provides advisory opinions to outside stakeholders to clarify the provisions of the Act and to provide guidance to business on the position the Commission is likely to take in respect of certain agreements, transactions or practices.

The Division aims to encourage and facilitate voluntary compliance with the provisions of the Act through education and information programmes. In addition, to facilitate compliance by businesses with the provisions of the Act, the Commission provides non-binding advisory opinions on matters which constitute clarifications of the Act. The Commission may also provide non-binding opinions as to whether the implementation of a proposed business plan or practice would comply with the Act.

Initially, the Commission received 125 written requests for clarification on various sections of the Act but this figure has dropped and has indicated that the provision of the Act have become clearer to practitioners and businesses.

In addition, the Compliance division has conducted presentations, workshops and meetings with business, both public and private, to promote voluntary compliance.

In terms of the Competition Act, it is compulsory for companies to notify trade unions of their intention to merge. Trade unions may participate in the merger proceedings and may file a Notice of Intention to Participate with the Commission. To facilitate their participation in cases, the Compliance division conducts training and presentations to trade union officials on the Competition Act and proceedings.

7. LEGAL SERVICES

The other critical area of the Commission is the Legal Services Division, which is responsible for providing legal opinions on all cases in the Commission. It is also responsible for the litigation of cases in the Tribunal. In addition, it is responsible for all litigation in the High Courts and other administrative bodies.

The Division was initially conceived on the basis that it would provide second opinions on legal issues in the Commission and then deal with matters referred to the Tribunal. The workload of the Division is very high due to the increase in the Commission's enforcement activities in particular cases referred to the Tribunal. In addition, the parties have also adopted a strategy of engaging the Commission in litigation. The strategy is to refer matters to the High Courts to avoid them being heard in the Tribunal. This is expected to continue in the short - medium term. However the cases referred to the Tribunal and the litigation therein, is expected to increase in the medium - long term.

8. CONCLUSION

The Commission has in the short space of its existence, helped to preserve and restore competition on markets. Certain key industries have not yet been exposed to competition, because of the dominance of state-owned enterprises in sectors that were previously regarded as natural monopolies. However, the Commission will try to play an important role in the deregulation of these sectors and the restructuring of state assets. Because, not only will the introduction of competition make these organisations more responsive to the needs of the market, bust South African businesses using their products and services will also benefit and become more globally competitive.

II. - ANNUAL REPORT OF THE COMPETITION TRIBUNAL FOR THE PERIOD 1 APRIL 2000 TO 31 MARCH 2001

Contents

1. Chairperson's introduction

South Africa's competition authorities are now fully up and running. The Competition Appeal Court, the third in the trio of institutions created by the Competition Act, was established in September 2000, with Judge Dennis Davis as its Judge President. The court has already commenced functioning. The Tribunal staff provides registry and other administrative services to the court.

For its part, the Tribunal continues to perform its functions effectively. Indeed, the overall functioning of the Tribunal has, if anything, become more streamlined, as the staff and members of the Tribunal acquire experience of the act and the rules.

In the year under review, a number of significant decisions have been taken, particularly in the area of merger regulation. However, while we continue to hear a steady stream of applications for interim relief, we have only recently received the first full complaint referral from the Commission. The time taken to bring restrictive practices complaints to full trial has clearly been underestimated. While this mirrors experience in other jurisdictions and reflects the immense complexity of these matters, it is clear that the task of implementing new legislation in a relatively new and untested constitutional environment adds an unforeseen element of delay and complexity. There are currently several High Court reviews of aspects of our legislation pending, reviews that stem directly from restrictive practice complaints submitted to the Commission. Our expectation is that once the High Court clarifies certain basic interpretations of our legislation, restrictive practice matters will begin finding their way to the Tribunal.

The work of the Tribunal impacts significantly on important commercial decisions and is, accordingly, subject to close scrutiny by the business and investment community and the media. The South African business community clearly has some way to go before it fully accepts the reality of a robust competition regime in South Africa. Although South Africa has had competition legislation for decades, this legislation was characterised by weak substantive and enforcement provisions. Weak competition law partly accounts for the high levels of concentrations in our economy and for the existence of business practices out of step with the requirements of a competitive economy. Because the Competition Act and the authorities responsible for its implementation, inevitably, question these long-established anti-competitive, though highly lucrative, practices, there has been some measure of resistance to our work in parts of the business community.

I am confident, however, that the South African government's decision to install an effective competition statute reflects international best practice. The past two decades have witnessed a significant extension of market relations, both globally and within individual nations. Markets, like any institution, require clear rules if they are to function effectively. The Competition Act represents an important component of these rules. We will inevitably brush up against those who have benefited from a lax set of rules in the past and we must expect, even welcome, criticism from these quarters. Certainly, we are encouraged by the growing sophistication of media analysis of our work and by the developing professional and academic interest in this critically important branch of law and economics.

Maintaining accounting and other records and an effective system of internal control is my responsibility as chairperson. I believe this requirement has been fulfilled and that the financial statements prepared fairly present the results of the Tribunal for the 12 months to 31 March 2001.

The Tribunal's annual financial statements are prepared on the historical cost basis and relevant accounting policies. These policies have continually been complied with. I approved the annual financial statements set out on pages …to (see printed version of the official brochure).

No material facts or circumstances have arisen between the date of the balance sheet and the date of approval which affect the financial position of the Competition Tribunal as reflected in these financial statements. I believe the Competition Tribunal is financially sound and operates as a going concern.

It remains for me to thank the members and staff of the Tribunal for their outstanding contribution.

David Lewis

2. The Competition Authorities

The Competition Act provides for the establishment of three institutions. These are:

- The Competition Commission investigates mergers and complaints of anti-competitive practices and grants exemptions;
- The Competition Tribunal is the court of first instance: it adjudicates cases referred to it by the Competition Commission or brought directly to it by an aggrieved party;
- The Competition Appeal Court has the status of the High Court, hears appeals and reviews decisions of the Competition Tribunal.

(diagram on the relationships between the institutions goes here) (see printed version of the official brochure)

3. The Functions of the Competition Tribunal

The Competition Tribunal adjudicates competition matters, in accordance with the Competition Act No 89 of 1998. It has jurisdiction throughout South Africa. The Competition Tribunal is independent and is subject to the constitution and the law. It must be impartial and perform its functions without fear, favour or prejudice.

When a matter is referred to it in terms of the Competition Act, the Tribunal must:

- authorise or prohibit a large merger, with or without conditions
- adjudicate appeals from the Competition Commission's decisions on intermediate mergers and exemptions
- adjudicate complaints of prohibited conduct in terms of the act by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in the act
- grant or deny an order for interim relief
- grant or deny an order for costs

4. The Competition Act

Section 2 of the Competition Act specifies that its purpose is to promote and maintain competition in the Republic to:

- Promote the efficiency, adaptability and development of the economy
- Provide consumers with competitive prices and product choices
- Promote employment and advance the social and economic welfare of all South Africans
- Expand opportunities for South Africa to participate in world markets and to recognise the role of foreign competition in the Republic
- Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy
- Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged people.

The Competition Act:

- Prohibits anti-competitive practices between firms in vertical and horizontal relationships
- Prohibits abuse of a dominant position
- Provides for restrictive practices to be exempted on specified grounds
- Requires notification of merger transactions above a specified threshold and for the regulation thereof.

5. Changes to the Competition Act

On 1 February 2001, the Competition Second Amendment Act came into operation. At the same time, new rules for the Competition Tribunal and Commission came into effect, as did new thresholds for the notification of mergers.

Although the amendments were wide ranging, touching on aspects of jurisdiction, procedural rights and institutional reform, they did not affect the core provisions of the act, which, with one minor change, remain the same.

The most prominent of these amendments was to delete a section of the act that excluded jurisdiction over “acts subject to or authorised by public regulation”. The ambit of this exclusion had led to conflicting interpretations in the high courts. The object of the provision, as has been observed by one judgment in the Supreme Court of Appeal, was to avoid a situation of double jeopardy so that a firm was not faced with having to defend itself twice under different regulations for the same conduct. What emerged in practice was that the exclusion was being interpreted too broadly so that firms in regulated

industries escaped the Competition Act's jurisdiction without being subject to equivalent regulation in their sector in respect of anti-competitive behaviour.

There will now be concurrent jurisdiction with sector regulators where the same conduct is the subject of the jurisdiction of both the Competition Act and the sector regulation. The difficulties this may lead to are ameliorated by a requirement in the act for sector regulators and the Competition Commission to enter into agreements to manage concurrent jurisdiction.

From the Tribunal's point of view, the most important impact of the changes has been at the level of procedure. Prior to the amendment, procedures in the act and rules were asymmetrical - for certain procedures, one had to look to the act to see how they were to be regulated while for others, one had to look to rules. All procedures are now treated on the same footing. Issues of standing and procedural rights are now uniform and are found in the act. Where rules are more detailed or differ in relation to specific procedures, these can be found in the respective rules of the Commission and the Tribunal.

The amendments have made merger regulation simpler, more focused and less onerous on business. In addition, the threshold for notification has been raised while fees have been reduced. These reforms have been well received by the business community. Labour, too, has benefited from the reforms. Unions can now appeal to the Tribunal against a decision of the Competition Commission in relation to an intermediate merger. Amendments to the rules now require merging firms to provide employees with a summary of the employment effects of the merger.

The amended act, new rules and thresholds can be found on the Tribunal's website.

Changes to merger thresholds and filing fees

It is compulsory for mergers above a certain threshold to be notified. Since 1 February 2001, the threshold for compulsory notification was raised from R50m to R200m of combined assets and/or turnover, and for the target firm from R5m to R30m of turnover or assets. As a consequence, fewer mergers will require compulsory notification.

As from 1 February 2001, the filing fees for large mergers have been reduced from R500 000 to R250 000; and for intermediate mergers from a maximum of R125 000 to R75 000.

6. The Competition Tribunal's members

The President, on recommendation from the Minister of Trade and Industry, appointed the chairperson and nine other members of the Tribunal with effect from 1 August 1999. Terms of appointment are for five years. Two of the members (including the chairperson) are full-time executive members and eight (including the deputy chairperson) are part-time non-executive members. The members of the Tribunal constitute the pool from which the chairperson appoints adjudicative panels comprising three members.

The act specifies that, viewed collectively, the membership of the Tribunal should represent a broad cross-section of the population of South Africa and that each member should be a citizen of the Republic and should have suitable qualifications and experience in economics, law, commerce, industry or public affairs. Six of the current Tribunal members have a legal background, three are economists and one is a chartered accountant.

Members of the Competition Tribunal

Chairperson
David Lewis (BCom, MA)

Deputy Chairperson
Advocate Marumo Moerane (BSc, BCom, LLB)

Full-time member
Norman Manoim (BA, LLB)

Part-time members
Urmila Bhoola (BA Hons, LLB, LLM)
Professor Frederick Fourie (BA Hons, MA, Ph.D)
Professor Merle Holden (BCom Hons, MA, PhD)
Phatudi Maponya (BProc, LLB, H Dip Company Law, LLM)
Christine Qunta (BA, LLB)
Diane Terblanche (BA, LLB, LLM)
Sindi Zilwa (BCompt Hons)

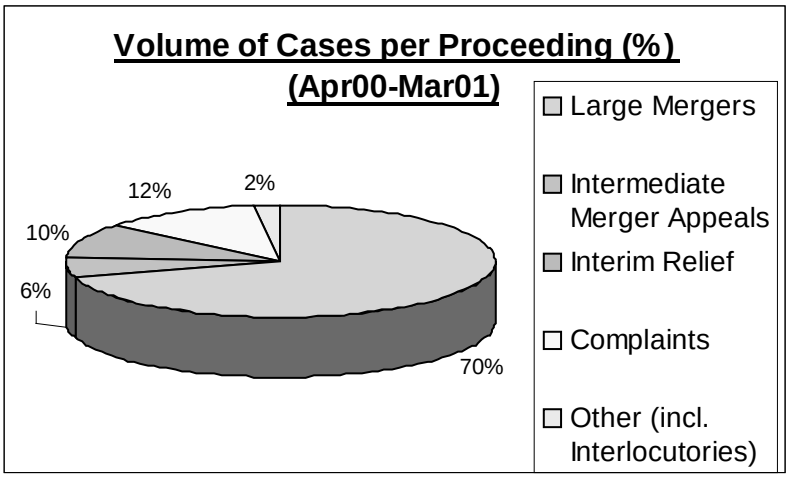
Tribunal members have met three times in the year to review their work and to keep abreast with specific aspects of competition economics and law. A two-day workshop on adjudication held in March 2001 was facilitated by Sir Christopher Bellamy, president of the UK Competition Appeals Tribunal, and Prof Richard Whish, Professor of Law at Kings College, London.

Tribunal members are also kept informed of cases through a quarterly newsletter, *The Tribunal Tribune*, which carries briefing articles on topical issues.

7. Competition Tribunal cases

7.1 Introduction

The Competition Tribunal issued 50 orders in this period, up from 14 for the seven months to 31 March 2000. They were distributed as follows:



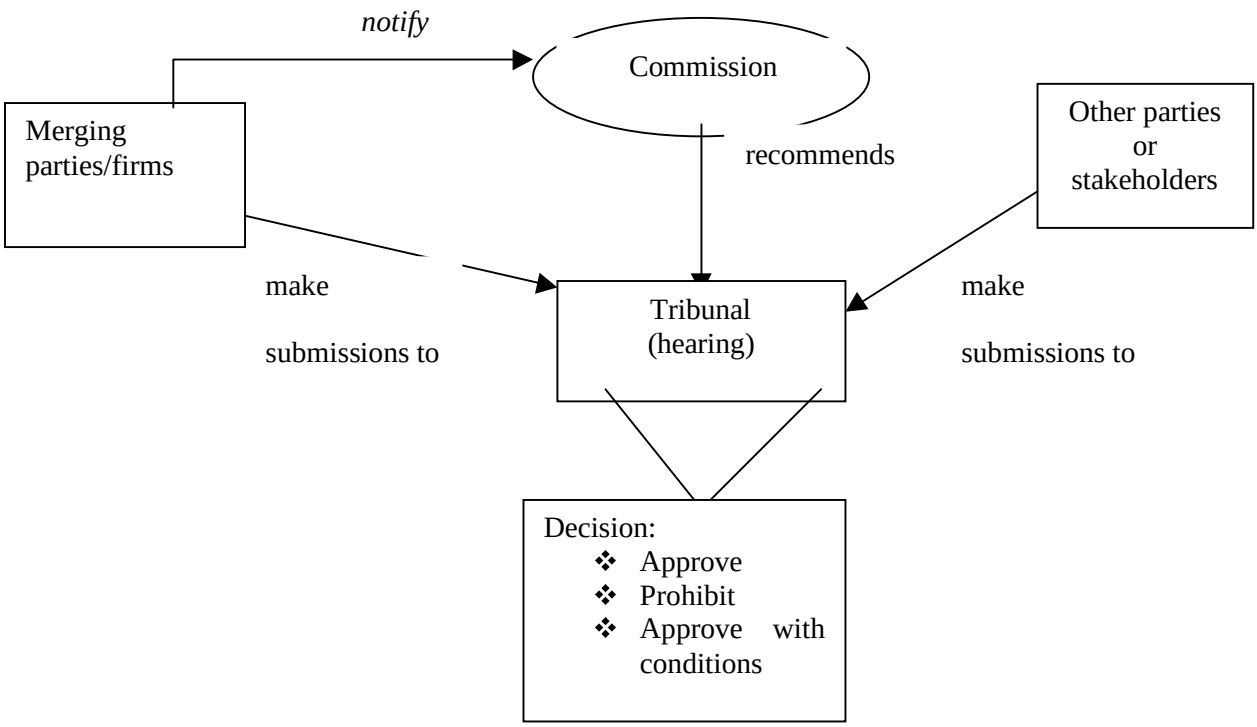
The vast majority of cases were in respect of merger transactions. It is difficult, however, to compare time expended on different types of proceedings, with some requiring greater scrutiny than others. In practical terms, cases differ in terms of volume of documentation, hearing time and writing time. These are generally substantial with complaint and interim relief applications and vary in relation to mergers.

The Tribunal publishes written reasons for all its decisions and provides considerable detail in cases where there are competition concerns. Even where there are no competition concerns, the Tribunal delivers reasons for its decisions in order to maintain an accurate record of the transaction and to promote an understanding of the factors considered in adjudication.

7.2 Large Mergers

All large mergers having an effect within the Republic of South Africa have to be approved by the Competition Tribunal. The merger is considered large if the combined turnover or combined assets of target and acquiring firms exceeds R3.5bn; and the assets or turnover of target firm exceed R100m.

7.2.1 Procedure for Assessing Mergers



7.2.2 The cases

The tribunal decided 35 large mergers between 1 April 2000 and 31 March 2001.

(List cases here – see annexure)

7.2.3 Decisions

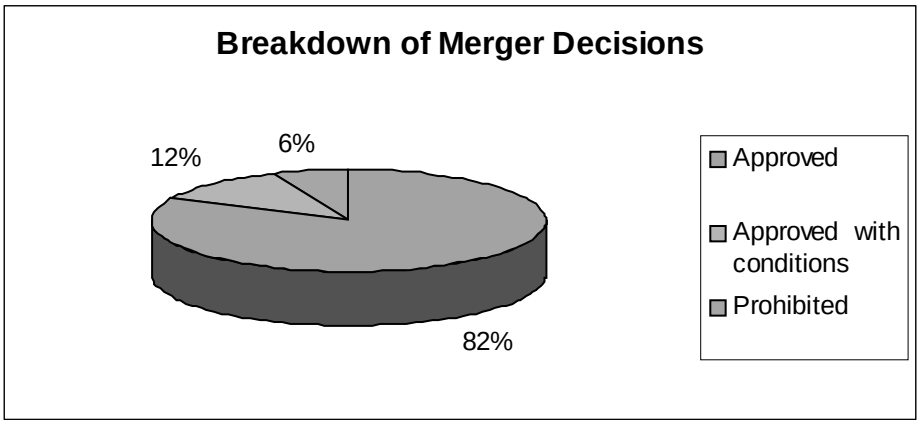
In the period under review, the Tribunal decided 35 large mergers. Of these, 29 were approved without conditions, four were approved with conditions and two were prohibited. Two notified matters were withdrawn.

7.2.4 Turnaround times

In its second year of operation, the Tribunal has continued to process its consideration of large merger transactions efficiently and swiftly.

Of the 35 merger transactions considered, the Tribunal released an order on the same day of the hearing in 24 (72%) of the cases, and in all but two of the remaining instances, an order was released within a week of the hearing.

Twenty-one (60%) were set down for hearing within 15 days of the Tribunal receiving a recommendation from the Commission.



7.2.5 Types of mergers

The Tribunal has considered transactions in varied product markets including consumer goods, chemicals and minerals, services and distribution. The majority comprised horizontal mergers (mergers between competing firms selling the same products or providing the same services), some conglomerate mergers (mergers between firms conducting unrelated business activities) and a small percentage comprised vertical mergers (mergers between firms operating at different stages of production)

The following shows the types of merger transactions according to the relationship of the parties pre-merger:

International mergers

23% of the mergers adjudicated during the review period formed part of multinational mergers, which were notified with several competition authorities worldwide. All were approved by the Tribunal.

7.2.6 Defences

The Competition Act allows parties to justify an otherwise anti-competitive merger with defences specified in the act. Frequently-invoked defences relate to efficiencies arising from the merger transaction and public interest arguments. In reality, there has been a tendency to combine these defences. Specifically, arguments that the merger would result in a "national champion" for a particular industry or sector is often incorporated with an efficiency defence.

None of the mergers considered in this period have been decided solely on public interest grounds. In one landmark decision, however (*Trident Steel (Pty) Ltd and Baldwins Steel*), the Tribunal allowed the efficiency defence to prevail over an otherwise anti-competitive merger.

"The efficiencies claimed are so overwhelming, especially in relation to the plant re-organisation that is entailed and the reduction of the scrap rate they suggest, that they will dwarf the anti-competitive effects."

Tribunal decision in the merger between Trident Steel (Pty) Ltd and Baldwins Steel

7.2.7 Public interest considerations

In addition to its core function to preserve and promote competition and consumer welfare, the Competition Tribunal is obliged to consider the public impact of transactions and how they prejudice the rights of less powerful interest groups. The Tribunal has maintained transparency and flexibility in allowing the participation of trade unions and other interested parties in its proceedings Public interest concerns have been considered in a number of decisions and featured prominently in the *JD/Ellerines* and *Tongaat-Hulett/TSB* transactions, although they were not in themselves decisive to the outcome in these cases.

In the merger between JD Group Limited and Ellerines Holding Limited, the Tribunal's major concern was consumer interests and their vulnerability* vis-à-vis *the merging of two large retail groups:

"…the interests directly affected by this merger are represented by millions of atomised, disorganised individuals incapable of defending their economic interests except to the extent that they are able to exercise a preference for one retail outlet over another… the real competition significance of this transaction is to be found in the direct links between the parties and South African consumers."

Reasons for Tribunal decision in the merger between JD Group Limited and Ellerines Holdings Limited

In Naspers Limited/The Education Investment Corporation Limited, *the Tribunal considered the impact of the merger on the education sector and on small business enterprises through onerous franchise agreements.*

"The potentially pervasive economic and social consequences of monopolistic structures and conduct in the education sector demand that the Tribunal pays particularly close attention to its public interest mandate."
"…there is no question that the impact of monopolistic practices in the private education sector will reverberate more powerfully on the economy and society than would similar practices in most other sectors."

The Tribunal approved this merger in the secondary and higher education sector, but imposed certain remedies designed to ameliorate the potentially negative consequences of the transaction for the public interest.

The merged company was ordered to collaborate with the Department of Education in building capacity in public education and to consult with franchisees if it were to alter the terms of the franchise agreement. The Tribunal also imposed a postponed divestiture remedy – a non-core brand may be divested in two years depending on the outcome of an investigation by the Competition Commission on the competitive impact of the transaction in the relevant markets. The Tribunal said in its decision: "The objective of a divestiture remedy is not punitive but it is rather to ensure the basis for continued competition".

The Tribunal has in certain instances (JD/Ellerines and Tongaat/TSB) employed its inquisitorial powers to allow an expansive scrutiny of particular mergers. It is within the ambit of the Tribunal to demand additional evidence, expert or otherwise, from both merging parties and the Competition Commission. Representation at Tribunal hearings from government departments and policy experts has provided information to contextualise merger transactions within broader public policy objectives and sector regulation.

The Tribunal's consideration of the proposed merger between Tongaat-Hulett Group Ltd and Transvaal Suiker Bpk exposed the tension between excessive regulation and preserving a competitive market. The proposed transaction would have occurred in a highly-regulated sector affected by government policy in a state of flux. In its decision to prohibit this transaction, the Tribunal considered the general tenure of regulatory policy and prospects for a liberalised market.

" In evaluating this merger considerable attention has been given to the interplay between regulation and competition, between regulation in the rest of the world and regulation in South Africa, and between competition in the rest of the world and competition in South Africa. ….the regulatory regime has undoubtedly undermined the extent of competition. In essence the tariff holds international competition at bay while the equitable proceeds arrangement eliminates the incentive to compete for domestic market share."

The Tribunal endeavours to ensure that the potential for competition and countervailing factors are not disregarded. In *Santam Ltd and Guardian National Insurance Company Ltd,* a merger in the short-term insurance industry, the Tribunal approved the transaction despite the merged entity having high market shares in most short-term insurance products.

"The broker's role as intermediary between the customer and insurer effectively consolidates the buying power of customers and should therefore contribute significantly towards countervailing the potential market power established by moderate to high concentration levels on the supply side of the markets."

Despite the Tribunal's due consideration of public interest submissions, it applies a flexible, case-by-case approach to evaluating them. It avoids, for example, taking an overly expansive view on long-term employment effects. Accordingly, a merger which could hypothetically create unemployment in unrelated industries in the distant future, will generally not deter the Tribunal from approving the immediate transaction under its consideration, provided of course the merger would not otherwise prevent or substantially lessen competition. However, the Tribunal will, in appropriate cases, seek undertakings from parties to allay public interest concerns.

In its decision on *TPI Investment (Pty) Ltd, Praysa 1062 (Pty) Ltd and Telkom SA Ltd*, a merger involving a restructuring of state assets by Telkom, the Tribunal acknowledged that the dynamic nature of the telecommunications industry warranted certain guarantees on employment. It included in its order voluntary undertakings from the parties to refrain from retrenching employees as a consequence of the transaction.

7.3 Intermediate Mergers

The Tribunal's role in intermediate mergers is to hear appeals on the decisions of the Competition Commission.

(List intermediate mergers here – see annexure)

Three decisions by the Competition Commission on intermediate mergers were appealed to the Tribunal in the period. In one of these, which was separately appealed by the parties to the merger, the Commission had not taken its decision within the requisite time period, necessitating the Tribunal's approval of the merger by default.

In another case involving pharmaceutical companies, *Glaxo Wellcome plc and Smithkline Beecham*, the Tribunal approved the merger conditional on the merged entity out-licensing the production of drugs in each of the three therapeutic categories where it would have had a significant market share. One of the cases, *Food & Allied Workers Union versus Heinz Frozen Foods and McCain Foods*, was not heard in the period.

7.4. Restrictive Practices

7.4.1 Complaint Referrals

Any person can lodge a complaint to the Commission about anti-competitive practices prohibited by the Competition Act. The Commission has one year to investigate such complaints. Investigations may also be initiated by the Competition Commissioner.

On completing its investigation, the Commission will either refer the matter to the Tribunal for adjudication or issue a notice of non-referral if it did not find that a prohibited practice had occurred. Complainants may make direct representation to the Tribunal when the Commission issues a notice of non-referral.

(List complaint referrals here – see annexure)

Of the 19 complaint referrals notified to the Tribunal in the period, 11 were referred by the Commission. Of these, six were settled by consent orders and five are pending. Eight complaint referrals were filed by complainants, following a non-referral by the Commission. These are pending.

Consent orders are issued by the Tribunal when the Commission and the respondent agree on the nature of the contravention and the appropriate remedy. The six consent orders agreed in the period related to agreements between parties in a vertical relationship (section 5(1)), minimum resale price maintenance (section 5(2)), engaging in an exclusionary act by a dominant firm (section 8(c)) and price discrimination by a dominant firm (section 9(1)). The respondents' willingness to make concessions to complainants by way of consent order further illustrates that the prohibited practices defined in the act are well understood and are effective in securing relief for complainants.

7.4.2 Interim Relief

Since complaint referrals take some time to investigate, a person is entitled to apply to the Competition Tribunal for interim relief, pending the outcome of the Commission's investigation. The Tribunal will grant interim relief if it is satisfied that the complainant may suffer irreparable harm during the period in which the investigation is taking place and having regard to the balance of convenience. The life of such interim relief orders are six months after issue (unless the Commission's enquiry is completed before this), extendable on good cause shown for a further six-month period.

(List interim relief applications here – see annexure)

During the period, there were 17 applications for interim relief, of which six were withdrawn, three were taken off the roll, two were granted, three were denied and three are pending.

In one of those granted, *Jakobus P Bezuidenhout vs Patensie Sitrus Beherend Limited*, the Tribunal ordered PSB to refrain from enforcing its option to purchase the claimant's citrus crop in accordance with its articles of association. This was the second application for interim relief brought before the Tribunal in which the provisions of the articles of association of a company converted from an agricultural co-operative were alleged to be anti-competitive.

In *National Association of Pharmaceutical Wholesalers & Others vs Glaxo Welcome SA (Pty) Ltd & Others*, the Tribunal granted the relief, ordering the manufacturers to continue to supply their products directly to the wholesalers on the same terms before the formation of a joint exclusive distribution agency. This decision has since been taken on review to the Competition Appeal Court.

Interim relief applications require less stringent proof than would be the case when the final complaint referral is heard. Nevertheless, the act still requires evidence of a prohibited practice and certain applications have failed due to a lack of sufficient evidence.

In *Natal Wholesale Chemists vs Astra Pharmaceuticals*, the wholesalers were unsuccessful in their application, alleging that the exclusive distribution agreements in place between various manufacturers and its distribution company constituted prohibited practices. Unlike the first pharmaceutical case, there were no horizontal agreements concluded between the two manufacturers in this case.

In the *Nationwide vs SAA*_case, the applicants failed in their application for interim relief claimed in pursuance of alleged abusive practices by the dominant carrier. Their claim included allegations of predatory pricing by SAA. The Tribunal was not satisfied with the evidence produced by Nationwide to sustain their allegations.

8. The staff of the Tribunal secretariat

The staff of the Competition Tribunal provides administrative, research and organisational support to the chairperson and Tribunal members.

Chief executive officer/registrar
Shan Ramburuth

Case managers
Kim Kampel
Rietsie Badenhorst
Thulani Kunene

Registry
Eugene Tsitsi, head of registry
David Tefu, registry clerk
Jerry Ramatlo, court orderly/driver
Tebogo Mputle, receptionist

Finance
Janeen de Klerk, head of finance
Donald Phiri, accounts assistant

Executive secretaries
Lerato Motaung, executive secretary to the chairperson
Ntombi Mothei, executive secretary to the CEO

9. Corporate governance

9.1 Compliance with legislation

The Competition Act

The Competition Act and the rules of the Competition Tribunal prescribe the functions, activities and procedures of the institution. The act and the rules were amended with effect from 1 February 2001 and procedures in the Tribunal were adjusted accordingly. The Tribunal secretariat periodically reviews its procedures to ensure that its work processes effectively and efficiently comply with the requirements of its prescribed rules. Workshops were held with staff in October 2000, February 2001 and March 2001 to streamline and strengthen procedures in the secretariat.

Audit Committee

An audit committee, established in March 2000, met twice this year**.** The committee is responsible for assisting the executive committee in fulfilling its supervisory responsibilities on internal controls, risk management, compliance with laws, regulations and ethics and financial management. Its functions are outlined in an audit committee charter, which was adopted on 6 December 2001**.**

Executive members:
- David Lewis
- Shan Ramburuth
- Janeen de Klerk

Non-executive members:
- Thabo Mosololi - chairperson
- Sakile Masuku
- Peter Modiselle
- Tobie Verwey

Internal audits
The auditing firm, Sithole AB&T, performs the internal auditing function for the Tribunal. In the current financial year, audits were done quarterly:

April 2000 – June 2000 (signed off on 3 October 2000)
July 2000 – September 2000 (signed off on 15 December 2000)
October 2000 – December 2000 (received and awaiting management comments)
January 2001 – February 2001 (awaiting report)

The audit committee adopted an internal audit charter in December 2000**.**

Internal audits have covered a range of areas identified by management and the internal auditors, including:

- Corporate governance and compliance with relevant legislation

- The efficiency and effectiveness of administrative policies and procedures

- The reliability and integrity of financial and operating information
- The consistency of programmes with established objectives and goals

The internal audits have verified the credibility of effective management controls in the Tribunal.

External audit
The office of the auditor general has completed an external audit for the period ending 31 March 2001.

Reporting to the Department of Trade and Industry
The Tribunal submits business plans and budgets to the DTI six months in advance of the following financial year and provides monthly reports on its activities, expenditure and budget variance.

Statutory requirements
The Tribunal has registered and met its obligations on the following levies and taxes:

The Receiver of Revenue exempted the Tribunal from Section 10(1)(a) of the Income Tax Act (1962) in November 2000.

9.2. Executive Committee

The executive committee of the Tribunal held 14 meetings in the review period. The executive committee provides policy direction on operational decision making and expenditure; and receives reports from the chief executive and the head of finance on operational plans and their implementation.

Members

- David Lewis, chairperson
- Marumo Moerane, deputy-chairperson
- Shan Ramburuth, CEO
- Janeen de Klerk, head of finance
- Norman Manoim, full-time Tribunal member.

9.3. Case Management Committee

The case management committee assists the chairperson in setting down matters on the Tribunal roll, convening panels and overseeing the administration and logistics for hearings. Meetings are recorded using a case management matrix system, which is designed to track the development and progress of each case. This committee meets weekly.

Members

- David Lewis - chairperson of the Competition Tribunal
- Norman Manoim – full-time member
- Shan Ramburuth - CEO

- Eugene Tsitsi - head of registry
- Lerato Motaung – executive secretary to the chairperson
- Rietsie Badenhorst - case manager
- Thulani Kunene – case manager
- Kim Kampel - case manager

9.4. Staff meetings

Staff meetings were held quarterly and have been effectively used to inform and consult staff on matters relating to the structure and functioning of the Tribunal and on human resource issues.

10. Case management

Cases are managed through the case management committee, which tracks the filing of documents and sets down cases for hearing. Case managers liaise with parties and panel members over the substantive aspects of a case, ensuring that relevant information is available. This includes arranging pre-hearings when required. The registry is responsible for document management and the logistics for hearings. The registry also attends to members of the public requesting access to case documents and ensures that confidentiality of documents is respected and maintained.

Case managers provide research support to panels in writing decisions. These include preparing summaries of cases, the acquisition and compilation of academic literature and case law from other jurisdictions and preparing briefing papers on specific topics relevant to cases. In addition, three research papers were prepared in the period under review.

11. Communicating the work of the Tribunal

The Competition Tribunal has an integrated communication programme to educate targeted audiences on the role and function of the Tribunal, to highlight decisions and to stimulate debate on competition policy. This includes making presentations at seminars, participation in conferences and providing information to journalists and others. Tribunal decisions are promptly posted on our website (www.comptrib.co.za). The Tribunal has achieved wide coverage in both the electronic and print media.

12. Keeping abreast with competition law and economics: conferences and international forums

The Competition Act requires that the Tribunal considers international jurisprudence in its adjudication. Competition law is a rapidly evolving field and the Tribunal has initiated and maintained considerable interaction with international experts and institutions to keep abreast of developments.

There is an active debate internationally on the impact of globalisation and the enforcement of competition law. The Tribunal has engaged with the Department of Trade and Industry and the World Trade Organisation in formulating a South African response to these issues. The chairperson of the Tribunal participates in the steering committee of the *Global Competition Initiative*, which is attempting to formalise and strengthen international cooperation in competition law enforcement. The plenary group includes representation from Mexico, Zambia, the European Union and the United States.

Tribunal members and staff have attended eight international conferences and presented papers at four of these.

The Tribunal has also actively contributed to international debates and has raised the profile of the South African competition regime by co-hosting an annual competition conference with the Competition Commission. The South African competition conference focuses on the role of competition authorities in developing countries and has become a respected event in the international agenda of anti-trust conferences. Two conferences were held in the period: *Regulation and competition* in April 2000 and *The impact of globalisation and new technology on competition* in March 2001. Both were addressed by leading international and local experts, with wide attendance and participation from practitioners, sector regulators, parliamentarians, policy makers, SADC competition officials, trade unions and others.

13. Training and human resource development

13.1 Employment equity

The Tribunal took into account employment equity in recruiting staff and this is reflected in the racial and gender distribution. We have complied with the requirements of the Employment Equity Act and timeously submitted our employment equity plan to the Department of Labour on 1 December 2000.

13.2 Staff Composition

The Tribunal secretariat consists of 12 staff - six are female, eight are black, one is Asian and three are white. Fifty percent have a bachelors degree or higher.

13.3 Training and Human Resource Development

The Tribunal is committed to cultivating a culture of learning throughout the organisation by providing employees with opportunities for development and further education in line with our objectives.

Some 88.90 working days have been spent in training during the current financial year. In terms of salary cost, this amounts to R195 863 (ie an average of 6.35 training days per person at an average cost of R2 203 per day). Training and development comprises both in-house training and external courses, workshops and conferences locally and internationally.

In addition, a bursary scheme assists employees to obtain further tertiary qualifications. Study loans cover tuition and examination fees up to R4 000 per annum per employee. Study loans are converted to bursaries on the employee successfully completing a course. During the current financial year, eight staff members received study loans totalling R27 650. Some 80% of these loans were allocated towards university degrees.

14. FINANCIAL MANAGEMENT

The budget for the 12-month period ending 31 March 2001 reflected expenditure (inclusive of capital expenditure) of R9.08m and estimated income (generated from fees and interest) of R7.05m.

Income for the year amounted to R10.28m and was distributed as follows:

Category	Amount (Rm)	Percentage (2001)	Percentage (2000)
Government grants	0	0	47.88
Donor funds	0.25	2.46	0
Filing fees	9.20	89.50	49.79
Other income	0.83	8.04	2.33
Total income	10.28	100	100

Total expenditure (including capital expenditure) for the period was R6.3 million.

Category	Percentage (2001)	Percentage (2000)
Capital	0.52	25.83
Personnel and admin	79.68	59.39
Recruitment and training	9.69	6.26
Professional services	10.11	8.52
Total expenditure	100	100

Capital expenditure decreased dramatically as most of these were incurred in set-up costs in the previous year.

Professional service expenditure includes payments to the commission (in terms of the MOU), hearing transcription services, legal fees and media and finance-related consulting services.

Recruitment and training expenditure includes costs associated with co-hosting the second annual competition conference

The variance in expenditure may in the main be attributed to a lower volume of cases (and therefore associated costs) than predicted.

Annexure – List of cases

Large mergers

Parties	Date of decision/order	Decision
Santam Ltd & Guardian National Insurance	04 Apr 00	Approved without conditions
Ford Motor Company and SAMCOR	05 Apr 00	Approved without conditions
P Q Data Trading (Pty) Ltd and Alexander Forbes Group (Pty) Ltd	05 Apr 00	Approved without conditions
Anglo American Plc and Silicon Smelters (Pty) Ltd	05 Apr 00	Approved without conditions
Distillers Corporation (SA) Limited and Hygrace Holdings (Pty) Ltd	10 Apr 00	Approved without conditions
Bromor Foods Ltd and The Game Sports Drink	14 Apr 00	Approved with conditions
Harmony Gold Mining Company Ltd and Randfontein Estates Limited	14 Apr 00	Approved without conditions
Pioneer Foods (Pty) Ltd and National Brands Ltd	19 Apr 00	Approved without conditions
Anglovaal Mining Ltd and De Beers Consolidated Mines Ltd	19 Apr 00	Approved without conditions
Ceramic Industries Ltd and Vitro Punched Tile	03 May 00	Approved without conditions
Aerospatiale Matra Societe Anonyme and Daimlerchrysler Aerospace AG	17 May 00	Approved without conditions
The Dow Chemical Company and Union Carbide Corporation	17 May 00	Approved without conditions
Imperial Holdings Limited and The Cold Chain (Pty) Ltd	24 May 00	Approved with conditions
Secotrade 72 (Pty) Ltd and Hyundai Motor Distributors (Pty) Ltd	01 June 00	Approved without conditions
Naspers Limited and The Education Investment Corporation Limited	13 Jun 00	Approved with conditions
Imperial Holdings Limited and J H Bachman (Pty) Ltd	28 Jun 00	Approved without conditions
Grayston Property No. 005 (Pty) Ltd and The Gateway Partnership	28 Jun 00	Approved without conditions
De Beers Consolidated Mines Limited and Industrial and Commercial Holdings Group Limited	14 Jul 00	Approved without conditions
Nasmedia Limited and Paarl Post Web Printers (Pty) Ltd	26 Jul 00	Approved without conditions
BP Amoco plc and Burmah Castrol plc	07 Aug 00	Approved without conditions
The Bidvest Group Limited and I-Fusion Limited	07 Aug 00	Approved without conditions
Franco-Nevada Mining Corp. Ltd and Gold Fields Limited	21 Aug 00	Approved without conditions
JD Group Limited and Ellerine Holdings Limited	31 Aug 00	Prohibited
Ford Motor Company and Land Rover Group Limited	06 Sep 00	Approved without conditions
Investec Group Limited and Frame Group Limited	06 Sep 00	Approved without conditions
Aveng Limited and LTA Limited	27 Sep 00	Approved without conditions
TPI Investment (Pty) Ltd, Praysa Trade 1062 (Pty) Ltd and Telkom SA Ltd	02 Oct 00	Approved with conditions

Tongaat – Hulett Group Ltd and Transvaal Suiker Beperk	27 Nov 00	Prohibited
Trident Steel (Pty) Ltd and Baldwins Steel	06 Dec 00	Approved without conditions
Roadway Logistics (Pty) Ltd and Roadway Transport Limited	13 Dec 00	Approved without conditions
Sasol Chemical Industries Ltd and Polyfos (Pty) Ltd	13 Dec 00	Approved without conditions
Sasol Chemical Industries Ltd and Fedmis Joint Venture	13 Dec 00	Approved without conditions
The Chase Manhattan Corporation and JP Morgan and Company Incorporated	13 Dec 00	Approved without conditions
Framatome Societe Anonyme and Siemens Aktiengesellschaft AG	14 Mar 01	Approved without conditions
Fabvest Investment Holding Ltd and National Cereal Holdings	14 Mar 01	Approved without conditions

Intermediate mergers

Parties	**Date of decision/order**	**Decision**
Food & Allied Workers Union v/s Heinz Frozen Foods and Mc Cain Foods	Pending	Pending
Nasmedia Limited and CT Media Limited v/s The Competition Commission	26 May 00	Approved
Bubble Pac (Pty) Ltd v/s The Competition Commission	28 Jun 00	Approved
Sealed Air Africa (Pty) Ltd v/s The Competition Commission	28 Jun 00	Approved
Glaxo Wellcome Plc and Smithkline Beecham v/s The Competition Commission	28 Jul 00	Approved with conditions

Complaint referrals

Parties	Date of decision/order	Decision
The Competition Commission v/s Seven Eleven Corporation SA (Pty) Ltd		Pending
The Competition Commission v/s Seven Eleven Africa (Pty) Ltd		Pending
Cine Biz (Pty) Ltd v/s Nu Metro Entertainment (Pty) Ltd & Nu Metro Theatres (Pty) Ltd		Taken off the roll
South African Recording Rights Association v/s Electronic Media Limited		Pending
Botswana Ash (Pty) Ltd, Chemserve Technical Products (Pty) Ltd v/s American Natural Soda Ash Corporation & Another		Pending
Berry Donaldson (Pty) Ltd v/s South African Airways (Pty) Ltd		Pending
The Competition Commission v/s South African Forestry Company Limited		Pending
Avalon Group (Pty) Ltd v/s Old Mutual Properties		Pending
The Competition Commission v/s Federal Mogul Aftermarket SA		Pending
The Perfume Shoppe (Pty) Ltd v/s The Prestige Group (Pty) Ltd		Pending
The Perfume Shoppe (Pty) Ltd v/s Horton Products (Pty) Ltd		Pending
Aero Africa management (Pty) Ltd v/s South African National Parks		Pending
The Competition Commission v/s South African Airways (Pty) Ltd		Pending
The Competition Commission in re Sphinx Acrylic v/s Acrylic Products and Plexicor	19 Apr 00	Consent order
The Competition Commission of S A v/s Palabora Mining Company Ltd	17 May 00	Consent order
The Competition Commission v/s Skye Products	25 Jan 01	Consent order
The Competition Commission v/s Myal Clothing Industries	25 Jan 01	Consent order
The Competition Commission v/s Nutri-Health Africa (Pty) Ltd	25 Jan 01	Consent order
The Competition Commission v/s American Natural Soda Ash & CHG Global (Pty) Ltd	27 Mar 01	Consent order

Interim relief

Parties	**Date of decision/order**	**Decision**
National Association of Pharmaceutical Wholesalers & Others v/s Glaxo Wellcome SA (Pty) Ltd & Others		Withdrawn
Modisi Moila Family Trust Agency v/s Sappi and Mondi		Withdrawn
Paarl Post Web Printers (Pty) Ltd v/s CTP Holdings & Another		Withdrawn
Sky Envelope & Stationery Manufacturers v/s Sappi Fine Papers		Taken off the roll
York Timber Limited v/s South African Forestry Company Limited		Withdrawn
Atasca Paper Merchants CC v/s Finwood Papers (Pty) Ltd & Others		Pending
Nutrifirst Pharmaceuticals (Pty) Ltd v/s Fresenius Kabi SA (Pty) Ltd & Others		Withdrawn
Netnews Bloemfontein (Pty) Ltd v/s Nasionale Pers Bpk		Withdrawn
New United Pharmaceutical Distributors & Others v/s Novartis SA (Pty) Ltd & Others		Pending
York Timbers Limited v/s South African Forestry Company Limited		Pending
Cine Biz (Pty) Ltd v/s United International Pictures (SA)	N/A	Taken off the roll
Cine Biz (Pty) Ltd v/s Nu Metro Entertainment (Pty) Ltd	N/A	Taken off the roll
Jakobus P Bezuidenhout v/s Patensie Sitrus Beherend Limited	10 July 00	Interim relief granted
National Association of Pharmaceutical Wholesalers & Others v/s Glaxo Wellcome SA (Pty) Ltd & Others.	29 Aug 00	Interim relief granted
Papercor CC v/s Finwood Papers (Pty) Ltd & Others	20 Oct 00	Application dismissed
Nationwide Airlines (Pty) Ltd v/s SouthAfrican Airways (Pty) Ltd & Others	21 Dec 00	Interim relief dismissed with costs
Natal Wholesale Chemists (Pty) Ltd v/s Astra Pharmaceuticals (Pty) Ltd	12 Mar 01	Interim relief denied

Competition Tribunal – 2001 score card

Objective as per business plan	***Target and result***	***Progress*** 0% 100%
REGISTRY		
Document management system	Filing system implemented; confidentiality maintained; documents timeously distributed to relevant parties	
Case management system	Time-frames in act adhered to; CMC meets weekly, effective communication with all parties; meetings and hearings set down	
Logistics	Hearings efficiently scheduled	
RESEARCH		
Case research	Research conducted for panels as required	
Newsletter	Four out of six planned newsletters produced	
Briefing papers	Three out of eight planned briefing papers produced	
Resource centre and source book	Material acquired; resource centre set up	
Annual conference	Conference held in April 2000 and March 2001	

OPERATIONS		
Policies and systems	Risk evaluation undertaken; policies and procedures reviewed at staff meetings	
Asset management	Policy approved, register updated monthly, physical assets inspected quarterly	
Human resource manual	Human resource policies agreed and manual compiled	
Performance management system	System agreed and implemented	
Training	Training identified and implemented; conferences attended	
Tribunal member meetings and training	Three out of four planned meetings/workshops held	
Code of ethics	Completed for staff but not Tribunal members	
Communication, media liaison and web site	Fair media coverage on decisions; Decisions publically available on web-site. Average of 400 hits per month	
FINANCE		
Financial management	Budgets compiled and reviewed; monthly reporting; internal and external audits completed	
Asset management	Asset register maintained and labelling process initiated	
Compliance with legislation and regulation	Statutory payments made; employment equity plan finalised; adherence to PFMA monitored regularly	
Payroll and HR records	Records maintained and updated; compliance with legislation.	

Result – Competition Tribunal was rated **joint fourth out of 24** in a survey of major international competition regulators by Global Competition Review, **ahead** of long-established heavyweights such as the **UK** Competition Commission and **US** Federal Trade Commission.

III. – QUESTIONNAIRE ON ANTI-CARTELS ACTIONS

The following report is based on a case that is currently at the Competition Tribunal stage. All the information supplied herewith is taken from the final Report thereof. Some of the questions could not be answered because they were either not applicable to the present case or that information had not come to light as a result of the Commission's investigations.

Background

The Complainants are both farmers of Citrus fruits in the Gamtoos River Valley in the Eastern Cape.

The respondent is a company that was originally a co-operative but was later corporatised and is now duly registered as such under the laws of South Africa. Their main business is the purchase, packaging and sale of citrus fruits.

The complainants became shareholders of the respondent in April1999. On or about that time, the Articles of Association, which form the basis of the complaint to the Commission, were enacted.

These Articles require that all produce be turned over to the respondent if a shareholder resigned and any debt owing to the respondent would become immediately due.

The respondent revealed the following:

a) That the respondent became aware that the existing facilities for packaging and storing of citrus produce were inadequate. It was proposed that additional storage be constructed.

b) The members (or shareholders) agreed, and the new facilities were built at a cost of R20 million.

c) In order to ensure repayment of this debt, the respondent instituted the Articles described hereinabove.

The questions posed are answered herein below:

Ad question 1:

a. (i) The respondent is a company registered as such in terms of the laws of South Africa.

(ii) The relevant product market is the packaging and resale of citrus fruits.

(iii) The geographic area is the Gamtoos River Valley in the Eastern Cape.

b. The evidence of collusion is direct, i.e. written in the Articles of Association.

c. The respondent's annual turnover for the past two years was as follows:

(i) 1998/1999 - R72 666 594
(ii) 1999/2000 - R76 294 854

d. Case still pending in the Competition Tribunal

Ad question 2:

a. The fixing of trading conditions by the respondent, vis-à-vis its shareholders, that is,

(i) all produce must be turned over to the respondent,

(ii) If a shareholder wants to sell shares, permission needs to be obtained from other shareholders. If the shareholder denies permission, then shares cannot be sold, otherwise penalties are imposed.

b. The fixing of trading conditions is per se illegal. In other words, substantial economic harm is presumed.

c. Counsel for respondent insisted that its client had done nothing wrong, notwithstanding the clear existence of the Articles.

d. None

B. General Information on Sanctions.

Ad question 4:

The standard of proof for all matters is that which is applicable to civil cases, namely, on a balance of the probabilities. If a firm is proven to have contravened the Act, the Competition Tribunal may impose an administrative penalty of not more than 10% of the firm's annual turnover within South Africa and its exports from South Africa during the firm's preceding financial year (section 59(2) of the Competition Act 89 of 1998, as amended).

There are criminal sanctions if one fails to comply with an order of the Tribunal or Competition Appeal Court, specifically, a fine not in excess of R500, 000.00 or imprisonment not exceeding 10 years.

Ad question 5:

With regard to Competition law violations, section 59(3) of the Act provides that when determining an appropriate penalty, the Competition Tribunal must consider the following factors:

a. the nature, duration, gravity and extent of the contravention;
b. any loss or damage suffered as a result of the contravention;

c. the behaviour of the *respondent*;
d. the market circumstances in which the contravention took place;
e. the level of profit derived from the contravention;
f. the degree to which the *respondent* has co-operated with the Competition Commission and the Competition Tribunal; and
g. whether the *respondent* has previously been found in contravention of *this Act.*

Subsection (4) provides that a fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the *Constitution.*

IV. – DESCRIPTION OF CASES AT THE COMPETITION TRIBUNAL

Case Number: 49/CR/Apr00

In the matter between:

American Natural Soda Ash Corp	First Applicant
CHC Global (Pty) Ltd	Second Applicant
and	
The Competition Commission	First respondent
Botswana Ash (Pty) Ltd	Second respondent (Intervening)
Chemserve Technical Products (Pty) Ltd	Third Respondent (Intervening)

In the Referral:

The Competition Commission	First Applicant
Botswana Ash (Pty) Ltd	Second Applicant (Intervening)
Chemserve Technical Products (Pty) Ltd	Third Applicant (Intervening)
and	
American Natural Soda Ash Corp	First respondent
CHC global (Pty) Ltd	Second respondent

Reasons and Order

BACKGROUND

This is an application brought by Ansac and CHC Global Pty Ltd ("Ansac") to dismiss a complaint referred to us by the Competition Commission (the "Commission") in April 2000 and an intervening claim brought by Botash and Chemserve ("Botash") in the same matter.

The Commission and Botash allege that Ansac has contravened the provisions of section 4(1)(b) of the Competition Act, (Act no 89 of 1998)[3]. The hearing into the application has not yet commenced and

3 The Commission alleges a breach of section 4(1)(b)(i), Botash a breach of section 4(1)(b)(i) and (ii).

we have decided that it would be appropriate to hear this application prior to the commencement of the hearing.

The application is composed of two parts /

1. An objection to us hearing the referral on jurisdictional grounds; and

2. Various exceptions to the referral.

In addition we asked the parties to present argument on the interpretation of section 4(1)(b)(i) which we thought could be conveniently heard at the same time as this application.

A short history of the litigation in this matter is appropriate in order for us to place the application in its proper context.

HISTORY OF THE LITIGATION

In October 1999 Botash launched an application for interim relief in terms of section 59 of the Competition Act[4] against Ansac. Botash alleged that Ansac was operating in South Africa in contravention of section 4(1)(b)(i) and (4)(1)(b) (ii) of the Act and engaged in predatory behavior in contravention of section 8. Ansac opposed this application and also launched its own application for interim relief against Botash in December 1999, alleging that Botash was engaged in predatory pricing against it

On 10 February 2000 after deliberations between the Commission, Ansac and Botash, the parties agreed to withdraw their respective interim relief applications provided the Commission finalised its investigation into Botash's complaint by 22 March 2000 by which date it had to either refer the complaint or issue a notice of non-referral. If the Commission referred the complaint Botash would have the right to intervene and fully participate in the Tribunal's proceedings, including the right to file a separate statement of particulars of complaint. The conditions were set out in an agreement between the parties that was made an order of the Tribunal.

On 23 March 2000 the Commission filed its complaint referral with the Tribunal. Ansac, responded by filing an application to request further particulars to the referral. The Commission, subsequent to this, decided to withdraw its referral and filed a fresh referral on 14 April 2000. The Tribunal published a notice of this referral in terms of section 51(3) of the Act in Government Gazette No. 21145 on 12 May 2000.

On 25 May Botash served intervening particulars of complaint on both Ansac and the Commission. However, the Competition Commission objected to this on grounds that neither the Act nor the Rules of the Tribunal permitted Botash to file such particulars. Ansac approached the Tribunal for an order seeking declaratory relief and the Tribunal granted Botash leave to intervene on 7 September 2000 after hearing the matter on 10 August 2000.

Ansac subsequently filed answering affidavits to both the Commission's complaint referral and to Botash's particulars of complaint. We then convened a pre-hearing conference on the 12 October 2000. At

4 Although the Competition Second Amendment Act, No. 39 of 2000 and new Tribunal Rules came into affect on 1 February 2001 we will be referring to the Competition Act and Tribunal Rules, as they were immediately before that date unless otherwise indicated.

this hearing the Tribunal member presiding suggested that a number of preliminary legal issues referred to in the papers should be determined initially. It was further suggested that as these legal issues might not be susceptible to adjudication in vacuo the parties should try and reach agreement on a statement of facts.

During subsequent pre-hearing conferences on 31 October and 24 November 2000 it became apparent that the parties were not able to reach agreement on a statement of facts. At the same time the Commission and Botash were insisting on discovery of certain documents from Ansac, which Ansac resisted.

Matters came to a head at a pre-hearing conference held on 14 December 2000 when Ansac claimed that it did not know what case it had to meet and said that the scope and ambit of discovery needed to be more precisely defined before it was prepared to make discovery. It was then agreed that the Commission would have the opportunity to amend its complaint referral and Botash its particulars of complaint. The Tribunal incorporated this, as well as an agreed timetable, into an order issued on 14 December 2000.

The Commission and Botash filed their respective amended pleadings on 8 January 2001. Ansac however did not file its amended answer in accordance with our order , but instead brought the application which is presently before us, on 16 January 2001, asking for the complaint to be dismissed. As the application raised a number of preliminary issues that were not being resolved through the process to get an agreed statement of facts we decided to hear this application before commencing the hearing..

At the commencement of our hearing into this application the Commission disputed whether it is competent for us to hear an exception. We advised the parties that our rules allow us to identify any legal issue that may be disposed of conveniently as a preliminary issue to be heard before the commencement of a hearing[5]. Since this was an appropriate case to follow that procedure we decided to do so. It was therefore entirely academic for us to decide whether we have the power to entertain exceptions or for us to give such proceedings the label of either a special plea, in limine point or exception. The parties accepted this and we proceeded to hear argument on the remaining issues.

JURISDICTIONAL POINT

Ansac contends that the complaint referral fails to satisfy the jurisdictional preconditions set out in section 50 of the Act.

That section states:

> *"(50). After completing its investigation, the Competition Commission must-*
>
> (a) refer the matter to the Competition Tribunal, if it determines, that a prohibited practice has been established; or
>
> *(b in any other case issue a notice of non-referral to the complainant in the prescribed form."*

Ansac identifies two jurisdictional preconditions in this section. The first is the Commission must have completed its investigation. The second is that the Commission must have determined that a prohibited practice has been established. Ansac argues that neither of these preconditions has been fulfilled.

5 See Rule 23(2)(a). (Now Rule 21(2)(a))

Ansac firstly relies for these propositions on a statement made by the Commission's counsel, Mr. Pretorius, at a pre-hearing conference on 14 December 2000 during which it alleges he had stated that the Commission had been unable to complete its investigation due to the time constraint imposed by this Tribunal on the referral of the complaint[6]. Ansac says that it thought nothing of this statement at the time considering that it had been made in the heat of the moment. Its attitude changed when on receipt of the Commission's answering affidavit in these objection proceedings Ms Singh[7], according to Ansac's reading of her affidavit, effectively reiterated that the matter had been referred before the investigation was complete and before the Commission had established a prohibited practice.

The chronology is important here. At the time of the last pre-hearing on the 14th of December 2000 Ansac had not yet filed its founding papers in this objection application and when it subsequently did this point was not taken. Nor was any contemporaneous comment made at the time of the pre-hearing on 14 December on the supposedly surprising admission of Mr. Pretorius. Presumably Ansac would say this was because at the time it was not alert to the fact. The first time this issue was raised by Ansac as a ground for objection was in its replying affidavit in this application. Thus when Ms Singh is deposing to her answering affidavit in these objection proceedings, the one on which Ansac places such reliance, she is not alive to this point indeed she is responding apparently to a complaint about discovery. Not surprisingly having seen the replying affidavit from the respondents in which this point is first raised the Commission filed a second affidavit from Ms Singh dealing with this aspect. In paragraph 3 of this affidavit Ms Singh states:

"The Commission at the time of the Referral, was in possession of sufficient evidence to determine that a prohibited practice had occurred. The Commission, however, would have preferred further time for investigation in order to put before the Tribunal the full extent of the effects of the alleged ANSAC cartel in the Republic of South Africa."

Ansac uses Mr. Pretorius's *alleged concession to establish its contention that the Commission had not completed its investigation. Whilst conceding that Ms Singh has never herself said so, they say the necessary implication of her failure to rebut Mr. Pretorius amounts to an admission of the correctness of his remarks at the pre-hearing. In the elegant phrase of Ansac's counsel "Ms Singh's silence on this point was clamant"*[8]*. Thus Ansac says the first jurisdictional prerequisite viz. a completed investigation has been shown to be absent. This prerequisite they submit is objectively reviewable.*

They then argue that they have established the second leg as well, notwithstanding Ms Singh's supplementary affidavit. Their reading of the affidavit is that Ms Singh concedes that the prohibited practice determination was based on an invalid assumption. By this we understand Ansac to be referring to her statement that she did not expect Ansac to put in issue that it had:

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6 As appears from the history set out above in terms of its order in February 2000 the Tribunal required the Commission to make its decision whether to refer the complaint by 22 March 2000. Ordinarily the Commission would have had a longer period to investigate the complaint.

7 Ms Singh is the Commission's investigator in the present complaint and the official who has deposed to the Commission's affidavit in both the Referral and the current application.

8 Mr. Pretorius who appeared for the Commission in these proceedings did not concede that these remarks were correctly attributed to him and declined to be drawn into the debate.(See Transcript pg 156)

"entered into no agreements with any customer in South Africa during the relevant period". (See Singh answering affidavit 4.2 Record C 71).

This failure they say makes the decision irrational and hence notwithstanding the subjective nature of this discretion renders it a nullity. (See Transcript pg 118 lines 5 – 20)

To arrive at this conclusion Ansac needed to do some extraordinary reading of the record and to place the most subjective gloss on the history of this litigation.

Let us consider what Ms Singh says and see if it offers a basis for attack on either of the two grounds mentioned above. What Ms Singh is explaining in paragraphs 4 and 5 of her answering affidavit is why the Commission had not anticipated the defence being mounted by Ansac and secondly the background to the dispute between the parties over discovery of Ansac's customer contracts. Ansac's reluctance to make discovery was frustrating the Commission who perceived that they could no longer rely on their investigative powers to compel the production of documents, but had to rely on an application to the Tribunal to effect discovery.

The fact that the Commission did not anticipate the present defence at the time it referred the dispute does not justify a conclusion of irrationality. A glance at Ansac's answer in the erstwhile interim relief application[9] indicates that Ansac did not rely on the current objections, which relate to the post – enactment nature of the transactions alleged, for its defence. Its principal defence and the one that Ms Singh anticipates relates to the issue of the extra- territorial application of this Act. Interestingly this point has not been pursued in this application. This shift in defensive posture, which Ansac is perfectly within its rights to assert, illustrates the fundamental problem of this review. Is the Commission supposed to anticipate every line of defence before referring a case? The answer is no. This proposition is followed in criminal law as the English case of Herniman v Smith illustrates:

> *"It is not the duty of the prosecutor to ascertain whether there is a defence, but whether there is a reasonable and probable cause for prosecution".*[10]

The Commission, having at the time and on an examination of the pleadings in the interim relief application assessed the likely issues in dispute, concluded its investigation and considered it had established a prohibitive practice existed. This Ms Singh states in paragraph 4.7 of her affidavit (Record page C 72) where she states:

"The Applicant (i.e. the Commission) was and remain convinced that a proper discovery of these documents will show that the respondents did enter into agreements during the relevant period, in addition to giving effect to the agreements referred to above…."

9 Case no 07/IR/0ct99

10 1938 AC 305 at 319 referred to in Beckenstrater v Rottcher and Theunissen 1955(1) SA 319 at 317.

She goes on at paragraph 5 of the same affidavit to say:

"The Applicant verily believes that proper discovery will show that other agreements were entered into between the commencement of the Act and the filing of referral"

These paragraphs clearly indicate that the Commission believes it has established the existence of a prohibited practice and that discovery of the documents will provide evidence to supplement the correctness of its belief as opposed to evidence required to establish the existence of its belief.

Do the suggestions made then in paragraph 6 of her affidavit coupled with Mr. Pretorius's remarks suggest that the Commission's investigation was incomplete? In this paragraph Ms Singh goes on to state:

"In the circumstances the Applicant would have preferred withdrawing the matter in toto in order to restore its investigative powers in terms of the Act. The Applicant is, however concerned that the provision of Section 67(2) may render the Respondents immune from further action should they do so. The Respondents were requested by the Commission to waive any rights in terms of Section 67(2), but they refused to do so. In the Commission's view the issue relating to the exception is an opportunistic attempt to render themselves immune from the provisions of the Act."

What the Commission is saying is this. We concluded our investigation. We did not anticipate a new defence made out by Ansac until we received their plea. At that stage we considered our investigative powers were terminated. Ansac refuses to provide us with the relevant documentation because they say no case to impugn them has been pleaded. Had we known all this before we filed the complaint referral we might have used our investigative powers to require their production. At most this is an expression of regret with the benefit of hindsight. It is not an admission that their investigation was not completed.

The structure of Ms Singh's affidavit attached to the April complaint referral suggests that the Commission after receipt of a complaint (paragraph 5) undertook an investigation in terms of which they made "findings". Ms Singh in paragraph 6.1 for instance uses the language:

"The Applicant investigated the complaint and found that…" (Our emphasis)

She goes on in paragraph 9 to identify their legal conclusions in a paragraph headed contraventions of the Act. [11]

On a proper reading of this affidavit one comes to the conclusion that the Commission has prima facie -

1. Conducted an investigation;

11 See Record pages A 31 –33.

2. Come to a finding, which suggests that the investigation has been concluded for the purposes of section 50; and

3. Established the existence of a prohibited practice.

Section 50 must be read as a whole. The purpose of the Commission's investigation is to determine whether a prohibited practice has been established in which case they must refer the matter to the Tribunal or if not to issue a notice of non-referral in terms of section 50(b). Thus the completion of the investigation must be read conjunctively with these two subsequent steps - it informs a decision to refer or not to refer. Completion of the investigation does not mean that the Commission must be ready to go to trial with every document in its docket at the moment of referral. Nor does it mean that it must exhaustively investigate each anticipated line of defence. Indeed at the time of referral the respondent will not have been required to indicate its defence and the Commission may be in the dark. While the Commission has powers to elicit information[12] it cannot compel a party to reveal its defence. The first time it is confronted with that defence as a matter of procedure, unless a respondent voluntarily indicates it earlier, is when the respondent files its answering affidavit to the complaint referral – a post section 50 event. Placed in its proper context completion of the investigation means completion for the purposes of a decision to refer or not to refer.

Ansac concedes that the prohibited practice determination entails a subjective discretion. Although they contend that the completion of the investigation is an objective fact they do concede its subjective aspect.

Despite the language of the section a proper analysis of section 50 suggests that the determination of whether an investigation is complete is more subjective than objective in character. The completion of an investigation is inextricably bound up with the consideration of the existence of a prohibited practice. As many investigators would have as many different views as to completeness. Part of this assessment depends on the individual predilections of investigators, part on consideration of what one needs to establish as a matter of law in a given case. Indeed this case is illustrative of the latter. On Botash and the Commission's argument far less extensive evidence of post enactment activity would be necessary to establish a violation. Following such an approach this investigator would come to the conclusion that an investigation had been completed while an investigator who would share Ansac's view of the law would not.

This illustrates the dangers of this type of review of the Commission's powers under section 50. One would be second-guessing the Commission's exercise of its discretion before a matter even came to a hearing before the Tribunal. Setting the standard for what constitutes a completed investigation too high would mean that investigations would take an enormous amount of time to conclude which cannot be in the interests of either complainants or respondents who have a defence. Perversely it is only the respondent likely to be found to have contravened the Act who would benefit by a protracted investigation as they would enjoy the fruits of their market power that much longer. It would also serve as an inducement to opportunistic respondents to force the Commission into a preliminary enquiry into their case prior to the commencement of a hearing.[13]

12 See Part E of Chapter 5.

13 We do not want to overstate the policy concerns as the Act from 1 February 2001 has been amended so that section 50 (1) of the Competition Second Amendment Act, No. 39 of 2000 now reads: " At any time after

Our courts have recognised these dangers in reviewing the power of the Attorney General to prosecute in criminal cases.

As the authors of the Commentary on the Criminal Procedure Act observe:

> *"Courts accept the prerogative of the Attorney General to institute criminal proceedings on charges he deems proper, and are reluctant to interfere. This is no doubt desirable, since the Attorney General is vested with the power and discretion in this regard. He has in front of him facts and material which are not available to the court, or the defence."*[14]

The authors go on to cite authority for the proposition that without proof of mala fides or gross unreasonableness a court of law will not interfere with the discretion of the Attorney General.[15] Even if this approach is subject to criticism of being overly deferent to officialdom when viewed in the context of our more heightened sensitivity to administrative review since the adoption of the Constitution, the facts of this case do not suggest that even a court more animated by an expansive view of administrative rights than its forebears would come to the conclusion that this decision is reviewable.

This does not lead to unfairness for Ansac. The Commission's decisions to complete an investigation and to refer a complaint are merely acts preparatory to a hearing before the Tribunal. The respondent retains its rights to defend itself including through the filing of pleadings, the right to raise preliminary objections on points of law and a full right of audience before the Tribunal during its proceedings. In a fair contest if the Commission is unprepared or has a flawed case it will lose, but we cannot stop it from entering the contest because we are asked a priori to form an opinion that it is not ready to win.

Botash argued that we do not have powers to review the Commission in these circumstances because our powers are confined to our statute. In terms of section 27(1) (c)[16] the Tribunal may "….review any decision of the Competition Commission that may in terms of this Act be referred to it." The Act they point out makes no provision for us to review a decision of the Commission in terms of section 50. Ansac has relied on cases, which suggest that an administrative tribunal has a general power to consider issues of jurisdiction. We do not need to decide this point as we have approached the issue by first making the assumption that we have the review powers Ansac contends we have and then asking whether the Commission's decision is reviewable. Since our answer to that question is in the negative we do not need to go on to decide whether we have such powers.

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initiating a complaint, the Competition Commission may refer the complaint to the Competition Tribunal." The amended section has removed both the prerequisites at issue in the present matter.

14 See Du Toit, De Jager, Paizes, Skeen and Van der Merwe, "*Commentary on the Criminal Procedure Act"*(Juta 1996) 1-4.

15 The case relied upon is Gillingham v Attorney General 1909 TS 572.

16 Section 27(1)(c) of the Competition Act as amended by the Competition Second Amendment Act, No 39 of 2000.

The objection to our jurisdiction to hear this complaint on the basis that the prerequisites of section 50 have not been established is accordingly dismissed.

EXCEPTIONS

We must now consider the various exceptions raised by Ansac.

Ansac argues that the case made out against it cannot extend beyond the ambit of the Commission's complaint referral. With this as its premise it goes on to argue that in the referral the Commission has based its case on the Ansac membership agreement and its agency agreement with CHC and since both these agreements predate the Act, which cannot be interpreted retrospectively to unsettle vested rights, the Commission's case must fail and cannot be resurrected by amendment.[17] Ansac describes the interveners' claim as being "parasitic" upon the complaint referral and if the latter is bad in law, the same fate must befall the interveners, even if a different construction is placed on the interveners' pleadings.

Ansac concede that if we find that the Commission, and of course by extension the interveners, are not bound by the parameters of the complaint referral and that some post enactment discretionary transactions other than the membership agreement and agency agreement could be inferred these would not be immunised by the presumption against retrospectivity. But here they add another bow to their quiver, for they argue as their fall back position that if such agreements are impugnable, they are not impugnable under section 4(1)(b). This is because section 4(1)(b) only impugns price fixing agreements not agreements between buyers and sellers. Ansac declines to identify the section of the Act under which they could be impugned, but since only section 4(1)(b) is relied on it does not need to traverse this.

Finally as the third leg to its objections it states that if post enactment transactions may be relied on then these transactions must be juristic acts and they must be pleaded with proper particularity. This it asserts the Commission and Botash have failed to do and the amendments have not cured this problem.

The Commission and Botash vehemently opposed all these criticisms. Whilst both concede the Act cannot be interpreted retroactively (in the sense that term has been understood in the case of National Director of Public Prosecutions v Carolus & Others 2000 (1) SA 1127 SCA) the ambit of retrospectivity is contested as well as the nature of the post enactment conduct required to establish a contravention of section 4(1)(b) and the Ansac reading of what section 4(1)(b) impugns. They further assert that Ansac has been provided with sufficient particularity to enable it to plead.

At the risk of over simplifying the respective approaches of the parties we would say that the Ansac analysis is premised on formal notions of contract and vested rights – that of the Commission and Botash on performance and effects.

We have decided that these issues would be more usefully decided after we have heard the evidence. The rationale for this conclusion is illustrated by the nature of the debate between the parties over the exception. For example on the retrospectivity point the parties have widely divergent views of what post enactment evidence suffices to establish a contravention. On this point as between Ansac and the Commission we have a continuum that ranges from the conclusion of a juristic act of price fixing, to the solicitation of an order. Absent proof of the nature of the act that took place post enactment and indeed

17 This argument is premised on paragraphs 6.1.1 , 7, 8 and 9 of Pearline Singh's affidavit attached to the Complaint Referral.

whether any are proved at all we see no useful purpose in making a determination now that can lead to imprecision and misinterpretation.

Similarly some of the other issues raised in the exception are also in our view more appropriately resolved once we have heard the evidence. Fundamental to all is the nature of the post enactment activity. We feel we need clarity on what these transactions are i.e. to consider the evidence before we can determine their legal significance. Important issues of law are involved here and we are reluctant to make a decision on the law prematurely based on speculation of what facts may finally be established at the hearing.[18]

Courts of law retain the discretion to order an exception to stand over to trial on the basis of convenience. In Herbstein and Van Winsen, two instances of when a court may exercise such a discretion are described.[19] One is where the exception raises a point of law that may not arise at trial and thus proves academic and the second when a proper decision on the exception is bound up in the merits of the dispute. Both these features characterise aspects of the present exception and we therefore leave the following objections of Ansac to stand over for a decision at the hearing of this matter viz:

1. Whether the transactions sought to be impugned pre-date the enactment of the statute – the retrospectivity argument

2. If post enactment transactions are impugnable they are nevertheless not covered by section 4(1)(b), because they are not acts of price fixing

3. If post enactment transaction are impugnable they must be juristic acts

Exception Issues to be determined

The remaining issues in the exception may conveniently be decided at this stage and we proceed to deal with them below.

1. The Commission and Botash are bound by the terms of the referral

Ansac argues that the terms of the referral determine the content and ambit of the complaint upon which the Tribunal may pronounce. These terms are those to be found in the affidavit of Ms Singh annexed to the complaint referral dated 14 April 2000. Ansac argues that Section 52(4) of the Act empowers the Tribunal to make, at the conclusion of the hearing, any order permitted in terms of Chapter 6. In Chapter 6 we find section 60 that sets out the orders the Tribunal may make in relation to a prohibited practice. Ansac then argues that the prohibited practice referred to in section 60 can only be the prohibited practice that is the subject of a referral in terms of section 50. It concludes:

18 This has been our approach to this litigation from the outset and the reason for us at the first pre-hearing trying to get the parties to reach an agreement on the facts, so that points of law were not argued in abstraction.

19 See Herbstein and Van Winsen , "The Civil Practice of the Supreme Court of South Africa", 4th Edition (Juta 1997) by L.Van Winsen , A.Cilliers and C.Loots and edited by M.Dendy , pg 489.

"It follows, it is submitted, that the Tribunal can only make a decision upon the complaint referred to it and within the compass of the terms of that referral."

There is nothing in the language of any of the sections cited that supports this proposition. The linkage between section 60 and section 50 which Ansac suggests is not stated expressly nor is there anything to suggest it should be inferred. The fact that both refer to the concept of prohibited practice is hardly remarkable.

Ansac next seek to place reliance on the fact that the Tribunal is obliged to publish the fact of the referral in the Government Gazette in terms of section 51(4). It is common cause that the purpose of this provision is to alert third parties to the impending proceedings. Ansac states that it is crucial that the Tribunal pronounce only on the complaint of which notice is given to the world.

Once again neither the logic nor language of the Act justifies such a conclusion. The purpose of the notice is to alert third parties to the broad parameters of a dispute so they can make further enquires if they so wish. The choice of language in the section is itself instructive. The notice must give details as to the "nature" not the "specifics" of the complaint. The notion that this notice defines the parameters of the dispute is absurd and it does not warrant much further elucidation to see how the approach that Ansac commends can lead to artificial objections being taken by opportunistic respondents on behalf of unnamed and supposedly disenfranchised third parties leading to the unhealthy elevation of form over substance.

We do not understand Ansac to be saying a complaint referral can never be amended (indeed this would mean that the Tribunal Rule that permits amendments is ultra vires the Act) but rather that the extent of the amendment may make it impermissible. Yet the amendments in this case seek to provide specificity and despite the passionate protests of Ansac, neither the Commission nor Botash have re-invented their original case. The foundations remain the same viz. the Ansac members' agreement and the agency agreement - it is further specificity about the post enactment transactions, which have now been supplied. The case has always been premised on the post enactment period. In the CC1 attached to the Commission's complaint referral the period during which the respondent is alleged to have contravened the Competition Act is stated as being from 1/ 09/99 to 14 April 1999.[20]

The amendments occasion no prejudice to Ansac as the hearing has not commenced and it is entitled to file an amended answer if it chooses to. The suggestion that the process should commence de novo is absurd.

2. Have the transactions been pleaded with sufficient particularity

Ansac complains that the issues in this case have been framed:

"so loosely that the respondents have been unable to determine what case they have to meet. …The applicants for their part have exploited the porous state of the pleadings to shift their

20 See Record page A 27.

ground and fish for information and the result has been uncertainty on the issues and an attempt at stating a case that has proved wholly abortive." [21]

They go on to complain that the amendments have done nothing to cure the situation.
Ansac argued that the kind of particularity required of the Complaint referral and, by analogy, the interveners' particulars is one that meets the requirements for a founding affidavit in application proceedings in the High Court. In several High Court cases to which we were referred the point is made that, in application proceedings, since the affidavit replaces essential evidence which would otherwise be led at trial, it must make out this evidence. [22] At the other end of the spectrum are particulars of claim in High Court trial proceedings where pleadings are not accompanied by affidavits and are characteristically sparse and terse. Thus High Court Rule 18(4), which provides for these particulars of claim states:

"Every pleading shall contain a clear and concise statement of the material facts on which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto." (Our emphasis)

In contrast Rule 6 of the High Court rules which regulates the requirements for applications omits the word material and states in Rule 6(1):

"…every application shall be brought on notice of motion supported by an "affidavit as to the facts upon which the Ansac relies for relief." (Our emphasis)

Our Tribunal rule 28(1) which regulates interim relief proceedings echoes this language and states:

"28(1) A claimant may initiate an interim relief proceeding in terms of section 59 by filing a Notice of Motion in Form CT6, and supporting affidavit setting out the facts on which the application is based."

In this context we can view Tribunal Rule 17 which provides for the form of a complaint referral. It states:

"17(2) Subject to Rule 26(1), a Complaint Referral must be supported by an affidavit setting out –

(a) a detailed statement of the particulars of the complaint; and

(b) the material facts relevant to the complaint and relied on by the person making the referral."

In one respect Rule 17 is similar to High Court Rule 18 (the particulars of claim rule) in that it requires that only "material" facts be set out, but it differs in another in that more analogous to application proceedings it requires an affidavit. The fact that this is more than an accidental choice of language is

21 Heads of Argument paragraph 25.2.3

22 See for instance Radebe v Eastern Transvaal Development Board, 1988 (2) SA 785, Swissborough Diamond Mines v Government of the RSA 1999 (2) SA 279

borne out by reference to the Tribunal's interim relief rule where as we saw the word 'material' does not appear and the language follows that of Rule 6 of the High Court Rules(the application rule). Thus while interim relief applications mirror the requirements for a High Court application, Rule 17 does not. It might be argued that Ansac is still correct because in contrast to the "material facts" of 17(2)(b), Rule 17(2)(a) requires a "detailed statement" of the particulars of the complaint.

However, reading Rule 17(2) as a whole suggests that what is required is that the prohibited practice be described with precision, but that its factual matrix can be averred with less specificity. Thus I need to know in detail what I am being "charged" with but I am not entitled to know in the referral all the facts which may be led at the hearing. Granted at times these distinctions may blur, but this problem is not pertinent to this case, because as we set out below, the amendments have provided sufficient precision to the complaint referral and particulars of claim to enable Ansac to appreciate the case against it.

Apart from the language of rule 17 the complaint referral's function must be understood in the context of the Rules and the Act. A complaint referral eventually becomes the subject of a hearing before the Tribunal. It is here where the Tribunal has unique procedural powers, which differ vastly from those of a civil court in adversarial civil proceedings. The problem for Ansac is that it has relied on civil court decisions in application proceedings as authority for its criticism of the present pleadings ignoring not only the institutional differences between High Courts and the Tribunal but also the different status that pleadings enjoy in each. We consider these differences below.

Some of the institutional differences between a civil court in adversarial proceedings and the Tribunal are-

The Tribunal is entitled to:

1. Conduct its proceedings inquisitorially (Section 52(2)(b))[23]

2. Call witnesses itself and require documents to be produced (Section 54)

3. At a pre-hearing to require the Commission to investigate specific issues or obtain certain evidence. (Rule 24(1)(b))

This leads us on immediately to the second consideration, for if the Tribunal is entitled to enter the fray in this way, unlike its civil court counterpart, it suggests that the function of pleadings to determine the parameters of a dispute, as we understand them in civil actions is diminished. The policy rationale behind this is that prohibited practices do not just have private effects but also affect the broader public. The Tribunal as the guardian of the purposes of the Act cannot be constrained by the ambit of pleadings to the extent would a civil court in adversarial proceedings. The legislature did not intend to make the Tribunal a prisoner confined by the walls of opposing lawyers' pleadings. We must bear in mind that the primary purpose of pleadings is to define the issues between the parties so that each knows what case it must be prepared to meet and secondly so that the court is in a position to identify the issues on which it must make its decision.[24] In the Tribunal's proceedings pleadings serve this function as well, but their status is less elevated given the inquisitorial nature of the Tribunal and the public character of complaint procedures we alluded to above. Consequently our approach to pleadings will be more flexible than a civil court's. Furthermore in our proceedings the defining of issues is not the sole preserve of the pleadings and

23 section 52(2)(b) of the Competition Act as amended by the Competition Second Amendment Act, No 39 of 2000, previously section 52(2)(a).

24 See L.T.C.Harms, "Civil Procedure in the Supreme Court", (Butterworths, September 2000) pg 263

this function can be supplemented by a pre-hearing conference. In terms of Rule 22(1)(c)[25] one of the functions of the assigned member who presides at a pre-hearing conference is to:

25 Tribunal Rules published on 1 February 2001 in terms of the Competition Act as amended by the Competition Second Amendment Act.

"Give directions in respect of :

(iii) clarifying and simplifying issues;
(iv) obtaining admissions of particular facts or documents."

On the other hand the Tribunal must ensure fairness and compliance with the requirements of natural justice. This is an obligation that does not extend merely to the stage of pleadings but infects the entire process before the Tribunal. This means that the Tribunal must control its proceedings in such a manner to ensure that a respondent can rebut prejudicial allegations to it. To the extent that a respondent wants issues further clarified before a hearing it too can rely on this procedure and it need not have to resort to the procedural formalities that one would utilize in a High Court.

We must now apply this analysis to the facts of this case. We were sympathetic to Ansac's complaint that the Commission's complaint referral and the interveners' particulars of claim lacked particularity about the effects or performance that was being alleged post enactment. However in our view the parties' respective amendments have now cured this.

In the Commission's case these amendments:

- elaborate on the respective relationships of Ansac and CHC; and

- in an alternative formulation, to be found in the new paragraph 9.2, list the customers with whom it is alleged that Ansac has framework agreements and detail the manner in which these agreements were given effect to (See paragraphs 9.2.1.2 and 9.2.2 – 9.2.5)

Botash in its amended particulars also:

- Clarifies the respective roles of Ansac and CHC (See paragraph 13); and

- Has inserted a new section in its particulars under the heading "Ansac's economic activities in South Africa" listing Ansac's customers in South Africa and specifying the acts that it alleges took place or alternatively had an economic effect within South Africa during the relevant period viz. 1 September 1999- April 2000.

In conclusion on this issue we find that:

- Rule 17 must be understood in the context of the procedural framework of the Act, which requires less formality in relation to pleadings than in adversarial civil proceedings because of the unique powers of the Tribunal and the fact that there are other procedural mechanisms that co-exist with pleadings in our Rules to achieve the objectives of defining the issues. On a textual analysis Rule 17 does not require the same elaboration in pleadings as one would expect of an application in the High Court.

- In the light of this analysis the Commission's amended referral and the interveners' amended particulars of claim contain sufficient particularity for the purpose of Rule 17.

per N. Manoim

concurring: D. Terblanche and D Lewis

DOES SECTION 4(1)(B) ALLOW FOR AN EFFICIENCY DEFENCE?

At the pre-hearing on the 24 January 2001 we asked the parties to prepare legal argument on this point, as the conclusion would determine whether this evidence could be led at the hearing. Although the issue did not form part of the application we deemed it convenient to consider the matter now since we were considering the other preliminary legal points.

Section 4 provides

(4)(1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if

(a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or

(iii) collusive tendering.[26]

ANSAC contends that even if a transgression of Section 4(1)(b) were to be established, it is entitled to raise an efficiency defence, it is entitled, in other words, to show, in the phrase ubiquitously present in the statute, that the offending agreement produces 'technological, efficiency, or other pro-competitive gain resulting from it that outweighs that effect'. The Commission and BOTASH argue that Section 4(1)(b) permits of no such defense – in the language of US anti-trust, offences specified in Section 4(1)(b) are prohibited *per se.*

We have decided to hear this matter now, because although distinct in character from the *in limine* points otherwise under consideration in the present hearings, the Tribunal's finding on the nature of Section 4(1)(b) will, like the other points at issue here, have an important bearing on the nature of the future hearings in this matter. A finding in favour of the Commission and the interveners presupposes that if, indeed, we conclude that their opponents have engaged in the conduct specified in 4(1)(b) – that is, if they have fixed prices or any other trading condition, divided markets or tendered collusively – then the contravention is established and evidence concerned to demonstrate any pro-competitive gains said to accrue as a result of the transgression will not be relevant. If, on the other hand, we accept the view contended for by ANSAC, then, even in the event that we find a price fixing and/or market sharing arrangement as alleged by the Commission and BOTASH, ANSAC will still be entitled to put up evidence purporting to show that the consequences of the anti-competitive practice are countervailed by efficiency gains for which it is responsible.

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26 Note that the recent Competition Amendment Act clears up an obvious area of ambiguity in this section by amending 4(1) to read 'An agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-' thus clarifying that both sub-clauses (a) and (b) refer to agreements between parties in a horizontal relationship.

ANSAC has set itself a considerable task. Section 4 of the Act identifies two classes of agreement between firms both of which it prohibits. The first class of 'horizontal restrictive practice' is identified in Section 4(1)(a). This section does not detail the content of the agreements that it proscribes – any agreement between parties in a horizontal relationship, without regard to its specific content, is put at risk by this section. However, it places an onus on those who would seek to impugn such an agreement to demonstrate that it 'has the effect of substantially preventing or lessening competition in a market' and, then, even if this onus is successfully discharged, the parties to the agreement are entitled to invoke, in their defence, 'any technological, efficiency or other pro-competitive gain ' that outweighs the agreement's negative impact on competition.

Section 4(1)(b), on the other hand, specifically details the very content of the agreements that it seeks to proscribe these being agreements to fix price or any other trading condition, agreements to divide markets, and collusive tendering. But this is all that is specified. In plain contrast with the requirements of Section 4(1)(a), those who set themselves the task of impugning agreements thus described in Section 4(1)(b) do not have to establish any deleterious impact on competition. All that has to be established is the existence of an agreement embodying the features detailed in Section 4(1)(b) (i)-(iii). Quite plainly the Act requires no showing other than that the agreement in question conforms to the content specified in Section 4(1)(b)(i)-(iii).

In other words, Sections 4(1)(a) and 4(1)(b) are distinguished from one another by the requirement contained in the former to undertake an assessment of the balance between the anti- and pro-competitive consequences of the agreement. By arguing that 4(1)(b) allows an efficiency defense – which of course implies a requirement to show the anti-competitive consequences without which there would be nothing against which to balance the pro-competitive gains – ANSAC effectively argues for obliterating the distinction between the two sections of the Act.

ANSAC contends for a 'purposive' interpretation of the Act. Firstly, even if we were, in this instance, to concede the necessity for a 'purposive' interpretation, it is by no means clear that an outright prohibition of price fixing and market allocation by competitors conflicts with the purpose of the Act. These practices are condemned in unusually uncompromising terms precisely because legions of legal scholars and economists as well as ordinary consumers have found them to be egregious attacks on competition which, as a glance at the head note to Section 2 will reveal, the Act purports to 'promote and maintain'.

Secondly, Mr. Unterhalter for Botash, following Schutz JA in Standard Bank and Melunsky AJA in SA Raisins, both judgments with direct reference to the Competition Act, argues that, while our courts have indeed endorsed a purposive approach to statutory interpretation, it is an approach manifestly reserved for circumstances in which the statute under question is ambiguous – where a reading of the legislation imparts a clear and unambiguous meaning it is not for the Tribunal or, for that other matter, any other court, to construct an alternative meaning, one putatively designed to better accommodate the statute's purpose. Section 4(1)(b) of the Competition Act unambiguously purports to prohibit, without recourse to further investigation, three categories of horizontal agreement. All other species of horizontal agreement only fall to be prohibited on a showing by the claimant that the agreement in question lessens or prevents competition and, then, only provided that the parties to the agreement cannot adduce evidence of pro-competitive gains that outweigh the demonstrated diminution of competition. There is no ambiguity and, whether or not we deem this wise policy, it is not within our power to re-make the law.[27]

27 With due respect to the learned authorities upon which Mr. Unterhalter relies, the statute is, in this instance, so devoid of ambiguity that he may have rested his case on Alice's celebrated rejoinder to Humpty Dumpty:

We are content to let the matter rest there. However, Mr. Brassey, for ANSAC, insists, in effect, that this would sanction an absurdity, that '(Section 4(1)(b)) plainly cannot hit every transaction that might conceivably fall within its ambit. If it did every sale would be prohibited, since sales always fix a price; so would every distributorship agreement, since they always create sales turfs and thus allocate markets; likewise every company created by several shareholders, every partnership and every joint venture; and so, indeed, would every other contract, since every contract regulates trading conditions'. (Heads of Argument Para 31.1). But these are, of course, proverbial straw men: a price fixed in a 'sale' is done as part of a vertical agreement and is not within the ambit of 4(1)(b); a distributorship, too, is a vertical arrangement between the producer of a good and service and the (downstream)'on-seller' or the (upstream) provider of distribution services.[28] We repeat: only horizontal agreements conforming to specified characteristics are hit by Section 4(1)(b). Indeed Mr. Brassey's straw men serve to emphasise the narrowness of Section 4(1)(b)'s focus, rather than, as he clearly intended, the broad sweep of its ambit.

ANSAC argues that US and EU courts have found it necessary to place a flexible interpretation on what, from a literal reading of their respective statutes, may 'hit' an inappropriately broad range of horizontal agreements. But, even were we to accept this interpretation of US and European experience, it is not clear how this avails ANSAC. This authority does not enable us, in the face of legislative clarity, to indulge gratuitously in an effective redrafting of the statute. Nor do we accept the implicit analogy drawn between the South African statute and those of the US and EU. Certainly, Section 1 of the Sherman Act is both terse and immensely broad ranging, accounting for Judge Brandeis' oft-cited concern that, on a literal interpretation, legitimate commerce may find itself impugned by the anti-trust statute. However, similar concerns do not extend to the Competition Act that is elaborately detailed and that, at least on this matter of horizontal agreements, admits of no ambiguity.

Nor, even if we were empowered to do so, would we lightly tread the path chosen by the US courts in this area. Our reading of the rather complex standard applied by the US courts is that where the 'quick look' contended for by ANSAC reveals the existence of a price fixing or market allocating restraint then this would be condemned as *per se* illegal, that is, the complainant would not have to establish a diminution of competition and the perpetrators of the restraint would not be entitled to invoke an efficiency defense. It appears, we agree, that the US courts have permitted occasional departures from this standard. This degree of judicial intervention in law making may be the legitimate and inevitable consequence of a statute that is at once extremely broad in its language and that admits of no formal exemptions. It does not, however, with all its attendant uncertainties, commend itself to a setting where the law is both focused in its concerns and where it is permits, again on clearly elaborated criteria, application for exemption. It is indeed conceivable that, in those few cases where the US courts appear to have relaxed their hostility to price fixing and market allocation agreements, the parties to the agreement in question would have found ground for exemption in the South African legislation.

Mr. Unterhalter has described Ansac's various constructions around the interpretation of Section 4(1)(b) as 'torturous'. We concur but conclude that the victim has not revealed any deeply hidden secrets. There are none to be revealed – in the language of US anti-trust jurisprudence, a 'quick look' at the 'facial' expression of Section 4(1)(b) reveals all.

"When I use a word", Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less.'
"The question is", said Alice, "whether you can make words mean so many different things." (Lewis Carroll 'Through the Looking Glass' Macmillan, 1980, p113)

28 A vertical agreement may of course be used to consolidate a horizontal arrangement. However, in that case it is the horizontal dimension, if it includes price fixing or market allocation, that falls foul of Section 4(1)(b) and not the vertical dimension.

per D. Lewis
concurring: N. Manoim and D. Terblanche

CONCLUSION

We find that the objection to the referral based on section 50 of the Act fails. The exception to the Complaint referral and the particulars of the intervener on the basis that they provide insufficient particularity also fails. We further find that the Commission is entitled to amend its complaint referral and Botash its particulars of complaint. We find that the objection that the Commission and Botash are confined to the terms of the original complaint referral are unfounded on the facts of the present case.

The remaining issues raised in the exception have not been decided and are left to the hearing for determination. For the sake of clarity we set out these issues again below:

1. Whether the transactions sought to be impugned pre-date the enactment of the statute – the retrospectivity argument

2. If post enactment transactions are impugnable they are nevertheless not covered by section 4(1)(b)

3. If post enactment transaction are impugnable they must be juristic acts

Ansac is required to file its answer, if any to the Complaint referral as amended, and the interveners' amended particulars of claim, within 10 business days of this decision. Ansac's failure to file its answer within the time period originally determined in our order dated 14 December 2000 is condoned.

On the argument we requested on section 4(1)(b) we find that evidence concerning any technological, efficiency, or other pro-competitive gain that might be admissible in terms of section 4(1)(a) is inadmissible in terms of section 4(1)(b).

Although the objection has been unsuccessful on the issues we have decided thus far, the prospect remains that the Ansac may be successful on the outstanding issues of the exception and accordingly the costs of this application as between Ansac and Botash are reserved for the hearing.

_____ 27 March 2001

N. Manoim **Date**

Concurring: D. Lewis and D. Terblanche.

Case No: 78/LM/Jul00

In the large merger between:

JD Group Limited

and

Ellerine Holdings Limited

Reasons for Competition Tribunal's Decision

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1. Prohibition

We prohibit the transaction between the JD Group Limited and Ellerines Holdings. The reasons for our decision are set out below.

2. The Transaction

This transaction involves the acquisition of control of Ellerines Holdings (EH) by the JD Group Limited (JD). This will entail JD acquiring the entire issued share capital in, and loan accounts of, all the underlying subsidiary companies of Ellerine Holdings including trademarks. The parties have agreed on an exchange ratio of 1 JD share for every 1,5 EH shares. This exchange will immediately make EH the largest shareholder – approximately 30,6% - in the newly constituted JD. However EH has undertaken to immediately unbundle its shareholding in JD, that is to distribute its interest in JD to its large range of underlying shareholders. Subsequent to this unbundling JD's shares will be held by a diversified range of shareholders – there will be no single controlling bloc of shareholders.

This is no ordinary transaction. It is the merging of two of South Africa's best known firms whose various trading brands are, it is no exaggeration to claim, household names. Literally millions of South Africans will, at one time or another, have entered an Ellerines or a Bradlows or a Russels or a Joshua Doore store. Few can have failed to notice the ubiquitous advertising campaigns of the two groups whether on film, television, radio or in the printed media. And, certainly a more important and lasting

experience than any of the aforementioned, a vast number of South Africans first received credit when purchasing furniture or household appliances from one of the stores in these two groups.

Nor, despite their vast size, are Ellerines and the JD Group faceless corporations led by professional managers on behalf of passive shareholders. Both are, to this day, led by their respective founders, who number as two of the country's more innovative entrepreneurs.

Mr. Eric Ellerine entered the furniture business in 1950 when, at 16 years of age, he opened his first store in Cyrildene, Johannesburg. Legend has it that his first sale was a credit sale. From these small beginnings, Ellerines has developed into a major force in South African retailing. Remarkable to record in these days of growth by acquisition, Ellerines' growth is almost entirely organic. The group comprises some 489 stores grouped into five store brands, of which the Ellerines brand itself, comprising some 218 stores, is the largest. Although several stores are based in neighbouring countries, Ellerines remains, overwhelmingly, a South African company. It is also a major source of credit with a debtors' book of little under R2 billion comprising the accounts of some of South Africa's poorest consumers, many of whom do not even have access to a bank account.

Mr. David Sussman began his working life as an assistant accountant in Eric Ellerine's head office. He left Ellerines in 1983. The rise of Sussman's JD Group is even more meteoric than that of his mentor. A mere 15 years ago Sussman controlled two Price 'n Pride outlets in Johannesburg. At present the JD Group comprises 678 stores organized into 5 different brands. The JD Group, in contrast with Ellerines, has relied for its growth on mergers and acquisitions. However, the JD Group's success is deeply rooted in its innovative trading practices, many adapted from the role model provided by the Ellerines' experience, but also characterized by the introduction of sophisticated technology and state of the art business practices. The JD Group has recently spread its wings into Europe with the acquisition of a chain of Polish furniture and appliance stores.

The significance of this transaction from a competition perspective should not be underestimated. In contrast with many transactions that come before this Tribunal this is not simply a case of the market leader taking over its fading opposition. What we rather have here are two dynamic firms more than capable of withstanding the competitive challenges that face them. Mr. Sussman himself is at pains to distinguish this transaction from previous deals in which he bought up and rescued ailing companies – Ellerines is anything but an ailing company.

However the real competition significance of this transaction is to be found in the direct links between the parties and South African consumers. An anti-trust merger evaluation is always primarily concerned with an assessment of the impact of the transaction in question on consumers. However, many mergers involve firms producing arcane intermediate products with the final consumer located several links lower in the production chain. In these instances the consumers directly affected is often themselves well resourced downstream producers capable of mounting a sophisticated response to a merger that it deems threatening to their commercial interests.

In this case however the parties to the transaction are the final link with the consumers, and, at that, the poorest, least powerful of South African consumers. In other words, the interests directly affected by this merger are represented by millions of atomized, disorganized individuals incapable of defending

their economic interests except to the extent that they are able to exercise a preference for one retail outlet over another. This evaluation will seek to assess whether the transaction has the potential to increase the power of the parties over the consumers that they serve and who are the source of their prosperity.

3. The Retail Furniture Trade: pertinent trends and features

3.1 Mergers and Acquisitions

There is a recent history of mergers and consolidation in the retail furniture industry and the consequent emergence of several large groups. In particular the growth of the JD Group, Profurn and Relyant has been driven by acquisition of existing chains. Ellerines' growth, on the other hand, is almost entirely organic. The composition and strategic direction of each of the large groups is briefly profiled.

The JD Group

Today's JD group has modest origins. Founder David Sussman commenced in 1983 with two Price 'n Pride stores. In 1986 he purchased the larger, then troubled, Joshua Doore chain from the Russell's grouping. In 1988 the firm acquired World and Bradlows from W&A, and the Score Furnishers chain. Then in 1993 JD acquired the Rusfurn Group.

The current composition of the JD Group is as follows:

Name of Store	Number of Stores	Age of Brand	Target Market
Bradlows	87(89)*	est 1900	LSM 5-8
Russels	173(183)	est 1943	LSM 4-7
Joshua Doore	125(133)	est 1973	LSM 4-7
Giddy's Electrical Express	90(95)	est 1958	LSM 4-7
Price'n Pride	203(159)**	est 1983	LSM 3-5
Score		est 1977	LSM 3-5

Total number of Stores: 678(659)

Notes

- * These figures are based on the totals in the 1999 Annual Report. The figures in brackets are those given to the Commission in May 2000 and reflect the changes since 1999.
- ** The store figures for Score and Price 'n Pride brands are combined.

Relyant Retail

The Relyant Group was formed in 1998 as a result of a merger between the former Beares and Amrel groups. In March this year it acquired Appliance City. It is currently composed as follows:

Name of Store	Number Stores	Age of Brand	Target Market
Geen and Richards	60(58) **	63	LSM(Upper 6 –lower8
Beares	169(203)	70	LSM 6
Furniture City	17(13)	20*	LSM(Middle 5-Upper 7)
Lubners	98(93)	36	LSM(5)
Fairdeal	93(75)	40	LSM(Lower 3 - middle5)
Savells	87(156)	40	LSM(Upper 3 – middle 4)

The total number of stores 524 (598)

* Furniture City was Amsterdam Furniture Store, which was started in 1963 and was then changed to its current name in 1980

**The first figure is from the Groups 1999 Annual Report. The figures in brackets are the 1998 figures provided for comparison.

The Relyant group's 1999 Annual Report specifically indicates that it has introduced strict credit granting criteria because at the time of the Amrel/ Beares merger the debtors' book was "significantly in arrear". The emphasis placed on credit management and new systems and the fact that staff performance will be measured against collection management indicates that Relyant's stores are likely to be less likely to grant credit to low income consumers than they were in the past. A 1999 report on the furniture retail trade by a stockbroking firm, Fleming Martin, says Beares and Savells (the latter being in the LSM3-4 category) have been deliberately contracting sales growth in order to improve the quality of their debtors' book. The closure of stores in these brands since 1998 is evidence of this. In addition the group has a higher debt equity ratio, 0.7 than analysts consider the desirable norm for this industry between 0.3 - 0.5. (This ratio is significantly higher than that of JD and Ellerines.)

Relyant has also been positioning its brands within their chosen markets reducing the number of their brands from 12 to 6.Each brand is being partnered by a top advertising agency. Relyant segments the markets at the lower end to a greater extent than the merging parties do. For instance the Annual Financial statements reflect that Savells is upper 3 middle 4, whilst Fairdeal is lower 4 and middle 5.

Profurn

The Profurn Group originates in a turnaround of the then Supreme Holdings which in 1992 had been in provisional liquidation. In 1997 the firm acquired Cape based Freedom Furniture which at the time had 12 stores. In 1998 it acquired the Morkels chain and, in 1999, the cash retailer, Hi Fi Corp.

Name of Store	**Number of Stores**	**Age of Brand**	**Target Market**
Morkels	150	50 years	LSM 5-8
Barnett's	71	103 years	LSM 3-5
Protea Furnishers	105	40 years	LSM 3-5
Freedom	33	5 years	LSM 3-5

The total of number of stores in South Africa at the end of 1999 was 359.

Profurn is engaged in aggressive expansion outside of South Africa. It has expanded into North Africa and Australia and intends opening up 43 stores outside of South Africa this year (Business Report 28/7/2000). The Financial Mail points out that although 2/3rds of its turnover is from SA it accounts for only 53% of its operating profits (Financial Mail Fox Column 12 May 2000). For this reason, overseas investment is said to be a major element of this group's expansion strategy.

The Fleming Martin report observes that " Profurn is growing from a much smaller SA store base (309) than its competitors….." The competitors mentioned are JD and Ellerines.

Profurn, like Relyant, also makes a point of how its debtors' book is improving due to strict credit granting and bad debt write off policies. According to the 1999 Annual report, "deposit rates now average 20% on credit deals" and they go onto state that they are "improving the quality of debtors whilst also enhancing cash flow."

Ellerine Holdings

Ellerine's, currently celebrating its 50th anniversary, owes its current size to organic growth rather than acquisition which distinguishes it from the three other listed chains referred to above.

Name of Store	Number of Stores	Age of Brand	Target Market
FurnCity	53(52)*	20 years	LSM 4-7
Ellerines	218(254)	50 years	LSM 3-5
Oxford	52(62)	30 year	LSM 3-5
Town Talk	114(116)	28 years	LSM 3-5
Royal	52(56)	25 years	LSM 3-5

Total number of stores 489

Notes
* The figures supplied by the parties to the Commission in May 2000. The figures in brackets are taken from the 1999 Annual Report.

Great Universal Stores

This U.K based group owns Lewis stores in South Africa and appliance group, Best Electric, which it formed in 1998. It also acquired furniture retailer Dan Hands but has since re-branded this small chain.

Name of Store	Number of Stores	Age of Brand *	Target Market
Lewis	430	approx.50-60 years	LSM4-6
Best Electric	30	2 years	LSM4-6

Total number of stores 460

An analysis of the groups profiled above reveals the following trends-

- Most have already diversified across LSM categories ranging from LSM 3 – 8.
- In diversifying across these LSM categories they have developed different brands for each category rather than aiming a brand across all categories
- There is a trend towards specialized appliance discounters in each group. Typically these brands cut across LSM segments. They are further distinguished from the traditional furniture and appliance stores serving the lower LSM categories in their larger cash to credit sales ratio. Profurn says its acquisition of HI FI Corp would increase its cash sales to credit from 25% to 40 %. (Financial Mail Top Companies 2000) These specialized appliance brands appear to operate primarily as discounters and tend to be based in the larger metropolitan areas. The establishment of specialized bedding stores is also a discernible recent trend.
- The brands in the furniture stores are all well established, some over 100 years old. Possibly because of the importance of brand recognition, the national chains tend to prefer (admittedly with some exceptions like Ellerine's FurnCity) acquiring established brands rather than starting new ones. Interestingly those businesses which tend to have the highest proportion of credit to cash as part of their sales mix tend to be long established brands. FurnCity's lack of success is thought to be due to lack of brand awareness.[29] The due diligence reflects that the Ellerine's brand, the older brand, is better known in the market place than JD's Score and Price'n Pride brands.
- The groups have portfolios of several hundred stores and are nationally dispersed. The annual statements reveal that the opening and closing of stores is a continual process and seems pivotal to the proper management and competitive strategies of the groups.

29 Ellerine Holdings Board Minutes, 2 May 2000

- Innovations by one competitor are matched particularly quickly by the others. Observe how all have moved into cell phone distribution, financial services and insurance packages.

- There is an observed tendency for the groups to contract with manufacturers for the production of exclusive products. See, by way of example, the Relyant Annual Report which refers to time spent with top suppliers to focus on "better value … *exclusivity*…". Both JD and Ellerines have similar arrangements with certain suppliers. This makes intra-brand pricing comparison more difficult for the consumer as we discuss elsewhere.

- The major groups are all expanding offshore either elsewhere in Africa or further afield (in Poland as with JD, or Australia as with Profurn)

- There is evidence of an increasing centralization of strategy and operations in the group or divisional head offices. Branch mangers are given less discretion and are more rule-bound particularly in decisions to grant credit and set prices. Advertising (and hence pricing) is centrally conducted.

- Increasingly sophisticated IT systems to control costs, inventory and to manage debtors are being installed. This naturally leads to centralized management referred to above.

- The ability to squeeze suppliers for discounts, volume rebates and extension of payment terms. Correspondence with suppliers given to us by the parties indicates that JD with its size and volumes is considerably more successful at this than has been Ellerines. Since manufacturers are presumably less tied to LSM segments for their products than are their retailer clients a group with brands across a manufacture ranges has more negotiating leverage than a retailer confined to a smaller extent of the LSM spectrum.[30]

- The groups tend to warehouse stock regionally so that individual stores do not have to be too large but nevertheless ensuring that the stores do not run short of stock. To quote Profurn MD Gavin Walker: " It is a mistake to have too much stock - funding is expensive – but no less problematic to be under stocked."(Financial Mail Top Companies 2000)

- The groups are listed on the stock exchange (Lewis' parent is listed in the UK) and for this reason can fund acquisitions more easily (the proposed merger in this case involves a share swop with no cash component) and can raise capital more cheaply through rights issues.

- The groups appear generally concerned at too great an exposure at the lowest end of the market. Some like Relyant and Profurn are, as already observed, tightening up their credit granting policies. All the groups, as is borne out by comments in their annual financial statements, are concerned about the spending potential of consumers in this market as the retail spend on furniture and appliances is being eroded by competing claims from gambling and lottery, and cell phones. Furthermore the aids pandemic is likely to have a disproportionately large impact on these consumers and both JD and Ellerines have undertaken studies into its impact on their business.

30 From an unpublished draft report prepared by Fleming Martin it appears that JD's 'accounts payable days' (that is on stock purchased) is approximately 150 days, whereas Ellerines is slightly under 80 days. Profurn and Relyant are at approximately the Ellerines level. This is supported by data from the due diligence which also reflects that JD has negotiated longer 'accounts payable' periods than Ellerines.

3.2 Brand Diversity

The large chains are, as already noted, characterized by the diverse market segments occupied by their various brands. The precise significance of this segmentation for the purposes of this anti-trust evaluation is the source of significant difference between the parties and the Commission, the implications of which are examined below. Suffice for now to note that the various brands are commonly identified by their positioning within the market. A feature of JD, Profurn and Relyant is that they have brands positioned across the range of the mass market.[31] Hence JD's Score and Price 'n Price brands are positioned at the lower end of the market, whereas Russell's is directed at the lower to middle and Bradlows' serves a higher income clientele. In Profurn and Relyant we see the same positoning of brand across the LSM range. The Lewis brand is positioned across a broader number of segments than that commonly occupied by a single brand.

The Ellerine's Group is, once again, something of an exception to this rule. It is comprised of five brands – however four of these, Ellerine's, its largest brand, Town Talk, Oxford and Royal are all directed at the lowest segment of the market while only Furn City, a small and reputedly unsuccessful chain, is directed at a higher segment. The Ellerines group is, then, to a far greater extent than its counterparts, focused on a single segment. It is suggested that the pedestrian performance of Ellerines Holdings in the recent past is attributable to this lack of brand diversity.

From a competitiveness perspective the key impetus underlying brand diversity seems to be the ability to exploit brand loyalty by moving customers upward through the groups stores. This is discussed in greater detail below.

In the past the racial identity of the customer base was the simple feature that distinguished one store brand from another. This was largely synonymous with income bands – hence low income stores were 'black stores' while those further up the income ladder were 'white stores'. While income and race are still, by and large, accurate markers of the positioning of the various store brands, in fact the methodology used nowadays to measure this diversity is considerably more complex and nuanced than simply race and income. The measure commonly employed is the Living Standards Measurement or LSM.

Living Standard Measures or LSM's refer to a method of segmenting consumers into profiles so that marketers can accurately identify their target markets. This is done by dividing the population into eight groups of approximately equal size. The LSM categories are divided according to living standards criteria such as education, residence, degree of urbanization, access to household electricity, motor vehicle ownership, preferences for appliances etc. The information is calculated from 20 variables and weighted for each respondent. Retailers use this information to form a picture of their target customers and so to provide for them accordingly. A retailer in the furniture industry who wants to target customers in the LSM 3-5 would study this data to get a picture of how much potential customers in this category spend, on what they spend their disposable income, which appliances they prefer, where they prefer to shop, etc. By way of example we are told in documentation submitted to us that LSM 5's are more likely to decorate their homes internally than LSM 1-4. All the chains we have referred to classify their stores along these lines and determine prices, product mix, advertising and store location accordingly.

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31 The term 'mass market' and its precise significance is also a source of some contention. Here we use it simply to distinguish any of these stores from the high end design furniture boutiques serving the very wealthy.

The distinction informs advertising strategy in very subtle ways as an amusing example alluded to during our proceedings shows. Ellerines in the LSM 3-5 market offer a free sheep worth R300 if goods above a specified amount are purchased. A graphic of a sheep is depicted in the advert. Bradlow's, the high end JD brand, also offers a free gift for customers purchasing above a specific amount. The gift, however, underlines the difference in social status of the LSM categories- Bradlow's offers not a free sheep, but a coffee table book on 101 ways to cook lamb!

4. The Evaluation

4.1 The Panel's Approach

The Competition Commission initially recommended outright rejection of the transaction. It has since recommended that the transaction be approved subject to certain conditions. While the parties naturally disagree and do not admit that the proposed transaction will impact negatively on competition, they have indicated that they are nevertheless willing to accept the conditions proposed by the Commission.

The panel of the Tribunal has approached the evaluation of the transaction in the following way:

We evaluate the transaction as notified to the Commission. Had we concluded that the transaction was unlikely to substantially prevent or lessen competition it would have been approved unconditionally. Under these circumstances the parties may nevertheless have elected to implement voluntarily the conditions agreed with the Commission.

However, given that we have found that the transaction as notified is likely to substantially prevent or lessen competition, and that there are no countervailing efficiency or public interest implications, we then proceeded to examine the proposed conditions.

4.2 The Relevant Market

As is frequently the case in merger evaluation, conflicting views on the impact of the transaction on competition begin with a disagreement on the precise definition of the relevant market.

The Commission holds that the relevant product market comprises furniture and appliances retailers serving the LSM 3-5 category and which provide credit to consumers. Furthermore the Commission holds that there are a large number of local relevant geographic markets corresponding to the geographic area to which consumers can practically turn for alternative sources of product.

The parties, on the other hand, argue that there are six distinguishable product markets at issue. These are furniture, bedding, white goods, brown goods, cellular telephones and financial services. Our reading of the Commission's understanding of 'furniture and appliances' is that it incorporates the first four markets identified by the parties, namely, furniture, bedding, white goods and brown goods. What is at contention is whether these be grouped as a composite product within a single product market (the Commission's view) or whether they be evaluated in relation to distinct product categories thereby

including all stores which compete with the parties for the sale of one, more or all of the products (the parties' view).[32]

Furthermore the parties insist that there is one mass market for each of the products identified. In other words they reject the Commission's argument that the market, or, in their view, the markets are segmented into LSM categories.

It is common cause between the parties and the Commission that the vast majority of furniture and appliance sales to consumers in the LSM 3-5 category are on credit – approximately 99% of Ellerines sales are credit sales, and the equivalent figure for JD's LSM 3-5 purchasers is only marginally lower. For purposes of defining the relevant market we accept the segmentation into credit and cash markets and agree that our concern is with sales of product on credit.

There is deep disagreement between the parties and the Commission with respect to the identification of the relevant geographic market. In contrast with the Commission's identification of a large number of local markets, the parties insist that the market is a national market.

Turning first to the product market(s), we examine the Commission's contention that these are stores operating in the market for 'furniture and appliances', as opposed to the parties' argument that holds that they are firms operating in four distinct product markets, furniture, bedding, white goods and brown goods. From the arguments presented, it is clear that the parties effectively identify two separate markets, namely furniture and appliances – certainly the competitors identified by the parties in their various submission are easily recognized as sellers of furniture or appliances or both. Are we dealing with two distinct product markets for furniture and appliances or a composite furniture and appliances market?

The significance of the argument is clear: accepting the parties' argument implies, in their view, that account be taken of '..the innumerable other stores which compete with the parties in one, more or all of the aforesaid categories….there are 4961 retail stores which compete in the same market for the sale of one, more or all of the products'.[33] In the evidence submitted by the parties they attach particular significance to competition from the large appliance discounters, Game and Dion's, and then from the variety of stores selling a mix of furniture and appliances similar to that sold by the parties themselves. The Commission effectively argues that only the latter, stores selling household furniture and household appliances – stores colloquially referred to as 'furniture shops' – be included in the relevant market. This would not only exclude appliance specialists like Game but it may also exclude high end furniture retailers that do not include the traditional 'furniture shop' mix of audio equipment, television sets, washing machines, refrigerators and other household appliances in their product mix.

An intuitive answer to what a judgment in a US District Court termed the 'general question' to be answered in relevant market enquiries – "whether two products can be used for the same purpose, and if

32 The parties also market cellular telephones and financial services. It is not suggested that the proposed merger portends anti-competitive consequences in these latter two markets. Moreover they do, at this stage, comprise a relatively minor part of the groups' activities. Accordingly they will not form part of this evaluation.

33 *Memorandum* submitted by parties

so, whether and to what extent purchasers are willing to substitute one for the other?"[34] – would almost certainly favour the parties' interpretation. After all a television set purchased from one of the parties' stores is functionally interchangeable with one purchased through any other store; a dining-room table is a dining-room table by another name – its functional characteristics are not altered by the fact that it is sold in a store that also deals in micro-wave ovens. And yet a number of important recent US and EU judgments have found that this apparently common-sense conclusion must be tempered by evidence suggesting that, despite the functional interchangability between the product offerings of the stores in question, different 'store types' frequently compete in distinct product markets.

The oft-cited case of Federal Trade Commission v Staples Inc.[35] relied upon econometric evidence that found that large format super stationery stores set their prices in relation to each other, effectively ignoring other retailers of identical stationery products. In explaining this counter-intuitive, but statistically robust, outcome the court in *Staples* relied upon the earlier Supreme Court decision in Brown Shoe Co. v United States which held that within a broad market "well-defined sub-markets may exist which, in themselves, constitute product markets for antitrust purposes".[36] The court in *Brown Shoe* identified a number of 'practical indicia' for determining whether a sub-market exists including "industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."

While sympathizing with the *Staples* judge's inability 'to fully articulate and explain all the ways in which superstores are unique' we too will follow the approach in *Brown Shoe* and examine whether or not there are 'practical indicia' that place 'furniture shops' – the term that we will use to describe the retail format employed by the parties – in a relevant market distinct from that of other sellers of similar or even identical products. This approach has been followed by a number of US Courts. In Bon-Ton Stores, Inc. v. May Department Stores[37], despite acknowledging that '..in a broad sense, traditional department stores do compete in a vast marketplace encompassing retailers in general', an enquiry into the 'practical indicia' of *Brown Shoe* nevertheless led to a rejection of the defendant's view that held that 'traditional department stores' referred to an excessively narrow market in that it excluded from consideration a range of other retail outlets selling products identical to those available from the 'traditional department stores': "Applying the *Brown Shoe* 'practical indicia', the court found that there were qualitative differences between traditional department stores and other retailers, including the physical appearance and layout of the stores, distinctive customers, the wide range of brand-name merchandise, and service." [38]

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34 Hayden Publishing Co. v. Cox Broadcasting cited *Staples* 1074

35 970 F.Supp. 1066 (D.D.C. 1997)

36 S.Ct. 1502, 370 U.S., 8 L.Ed. 510

37 W.D.N.Y 1994

38 Cited *Staples* 1080. In *Bon Ton* the Judge noted: '..the fact that two vendors both sell a particular type of merchandise does not necessarily mean that they are in the same product market. If the market were defined that broadly, it is hard to conceive of any merger or acquisition involving retailers that would have an anti-competitive effect'. See also State of California ve American Stores; Alpha Beta Acqisition Corp.; Lucky Stores, Inc. (872 F. 2d 837, 57 USLW 2581 where the District Court accepted California's view that '..the relevant produce market was limited to supermarkets – full-line grocery stores with more than 10 000 square feet. The District Court reasoned that only such supermarkets compete for consumers' periodic grocery shopping needs.'

This approach was effectively followed by the European Commission in a recent matter involving the acquisition of the Dutch assets of the US super store toy retailer, Toys R Us, by a Dutch toy retailer, Blokker. Here the EC defined the relevant product market as 'the retail of toys through *specialized* toy retail outlets' thus rejecting the parties' plea to include all toy outlets – department stores, general stores, etc - in the relevant market.[39]

We have not been supplied with econometric evidence that a'la *Staples* establishes that the furniture shops price their appliances only in relation to each other or, conversely, that they do not set their prices in relation to those set by the large appliance discounters. However, the Commission insists that these stores are not part of the relevant market while the parties, essentially relying upon the functional interchangability of the products offered, take the contrary view. We need to ask ourselves whether there are strong 'practical indicia' that serve to place furniture shops in a relevant market distinct from the large appliance discounter chains of which Game is the prime example?

In our view there is, indeed, evidence that these are segmented markets. The furniture shops and the appliance discounters do not appear to target the same market segments. There is first the question of location. The appliance discounters appear to target the large urban markets only, whereas the furniture shop chains have a presence throughout the country, in the large urban centers and in the large as well as smaller rural towns. Moreover, within the urban areas the discounters tend to locate on the peripheries of the cities – in marked contrast with the furniture shops they make no effort to locate themselves in areas convenient to customers who rely on public transport.

Secondly, although the discounters do offer credit their key competitive advantage lies in discounted cash prices, an advantage that the consumer loses in a credit purchase. Hence the ratio of cash to credit sales is considerably higher than that of the parties to this transaction and the discounters make no effort to locate in areas of town convenient to those who would not be able to afford a cash purchase. It appears that although credit is available, the scoring criteria used by the discounters for would be credit customers are considerably more stringent than those applied by the parties to this transaction – in short, the discounters are low price (low margin) and consequently risk averse; the furniture shops operate on relatively high margins and this gives them the ability to take on significantly greater levels of risk.

Thirdly, although there are definite areas of overlap in the products on offer from the discounters and the furniture shops, both are engaged in areas in which there is no overlap at all. Hence the range of appliances on offer from the discounters extends well beyond that offered by the furniture shops – where the discounters sell sports equipment, computer hardware and even CD's, the appliance range of the furniture shops is confined to the more traditional household white good range (large kitchen appliances like fridges and stoves, washing machines, etc) and to those appliances or 'brown goods' that are effectively part of the lounge furniture (music centers and television sets and VCRs). Hence even if functional interchangability is used as the basis for determining the relevant market, it is clear that it would remain confined to a select part of the respective activities of the retailers and furniture shops.

In short then we conclude that there are indeed powerful 'practical indicia' that indicate that the appliance discounters and the furniture shops do not occupy the same relevant market despite a degree of functional overlap in the products each offer. The appliance discounters and the furniture shops are not

39 European Commission – Case No IV/M.890 – Blokker/Toys 'R' Us (98/663/EC)

directed at the same market and this is reflected in their pricing strategies, their approach to credit, and their choice of location.[40] It has been suggested that this choice of market is also reflected in their respective levels of service, with the furniture shops more customer oriented in their service – they are, after all, generally establishing long term relationships with their predominantly credit customers. The discounters, on the other hand, are focused on high cash turnover and provide a notoriously rudimentary service.[41]

The distinction between the furniture shops and the discounters is sharpened if the relevant market is narrowed down, as the Commission proposes, to the LSM 3-5 range of customers. The discounters are not poor people's stores – they are stores aimed at price conscious middle-income consumers. By contrast, argues the Commission, the parties to this transaction are located in a market segment that serves low-income consumers. This view is rejected by the parties who argue that there is a single mass market for furniture and appliances, that is, that differently resourced participants in the market for appliances and furniture do not shop at particular stores to the exclusion of others, and, hence, do not serve to introduce an income or living standard based segment into the relevant market.

The assertion by the parties of a single mass market flies in the face of much of the evidence presented to us. For example the parties themselves use terms like 'traditional' and 'aspirational' to distinguish the market orientation of their brands; they have submitted considerable documentation in which they segment the market using the LSM criteria; the evidence submitted that elaborates how the JD Group decides whether to open a new store, where to position it, and which of its various brands to establish in any given location is clearly indicative of the importance that the parties themselves attach to the various living standards and income measurements.[42]

We have no doubt that these categories and the boundaries between them are dynamic, are constantly shifting. Their range of brands and the sheer number of their stores combined with the diverse formats of their stores (that is, in ascending order of scale, 'satellite stores', 'conventional stores' and 'super stores') gives the parties the ability to open and close stores relatively rapidly in response to changing market conditions and economic circumstances. We also readily accept that at the margins of

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40 As noted above it appears that the large furniture chains are establishing specialized appliance discounters who may well be in the same relevant market as the discounters like Game.

41 These arguments are borne out in a recent interview with Mr. Allan Herman, the Managing Director of Massdiscounters, the discounters division of Massmart, incorporating Game and Dion's. *Business Report* (24 August 2000) reports that 'Herman said Game's winning formula was price leadership as well as price aggression and range. "Game offers the widest selection of merchandise under one roof" he said.'

42 In its presentation to the Tribunal on the 10th August the Commission supported its arguments by citing numerous statements made by representatives of the parties. For example Mr. Eric Ellerine, in responding positively to the transaction, is quoted as saying: "JD are the market leaders in the middle income group (LSM Market 4 to 8) through their Russels, Bradlows, Joshua Doore and Giddy's Electric Express. We are the market leaders in the lower income group (LSM 3 to 5)". And in an interview with the Commission Mr. David Sussman stated: "Score/Price&Pride on the bottom end of the pyramid – clearly LSM 3-5". And again: "JD Group envisaged creating a new chain of stores – maybe targeted between Bradlows and lower segment or above Score/Price&Pride segment". In documentation submitted to this enquiry the parties noted: 'It intended that, over time, the new JD Group will reposition certain by converting in the region of 100 of the total 436 Ellerines stores currently serving the LSM 3-5 market upwards to target the LSM 4-7 markets'. And further: 'It should also be observed that the consumer market is a dynamic one in which the consumers are constantly changing their store preferences as their income levels rise.'

each of the store brands there is a certain degree of intentional overlapping of product directed at several LSM levels – hence a consumer in the LSM 3-5 category will not always be confined to a store predominantly located in that market segment but will find that the lower priced products in the next category suit her pocket[43]; naturally consumers in higher brackets will frequently source product in lower categories. But none of this serves to deny the legitimacy of segmenting markets by income category or that store brands are specifically positioned to serve designated segments. In short the parties themselves effectively acknowledge the centrality of the LSM categories in the competitive positioning of their stores.

However, possibly the strongest evidence of clear market segmentation is found in the pricing strategies employed by both groups in the lower segment relative to those employed in higher segments. Evidence submitted by the parties clearly establishes that the gross margins in the LSM 3-5 segment are significantly higher than those charged in the segments immediately above. This is clearly associated with the greater risk attached to providing credit and speaks clearly to a marked differentiation or segmentation of the market.

In summary then we conclude that the relevant market is composed of furniture shops (with a product mix of furniture and appliances) directed at credit sales to consumers in the LSM3-5 category.

The final element in defining the relevant market relates to the geographic component of the definition. The parties insist that the market is national, while the Commission argues that there are a large number of local markets.

The geographic market is conventionally understood to refer to that geographic area to which consumers can practically turn for alternative sources of product and in which the antitrust defendant faces competition.

In concluding that the geographic market is local, or, more correctly, that there are a large number of local markets, the Commission has placed emphasis on the first part of the definition, that is, the geographic area in which consumers can practically turn for alternative sources of product. A bulky product like furniture will generally be purchased as close as possible to the location at which it is utilized, the more so when it is bought on credit and the consumers, many 'unbanked' and therefore without access to convenient stop order facilities, have to present themselves at the store each month to pay their credit installment. The parties point out that, in a country where it is still not uncommon for breadwinners to work some distance from their family homes, the preferred site of purchase is one proximate to the place of work precisely to enable the breadwinner to affect the monthly payment. The extensive network of stores then allows the delivery of the product to be affected by a store in the residential neighbourhood.

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43 This appears to be part of a deliberate and eminently sensible strategy aimed at enabling consumers to 'migrate upwards' – it ensures that the migration upwards takes place along a continuous upward slope rather than a discontinuous leap (see notes of David Sussman's interview with Commission: 'Entry market – credit risk high and therefore risk market is limited. As customers establish a credit record, they are able to migrate upwards'). Note further, Mr. Sussman's statement: 'What I think will happen is that where we have got an abundance of stores competing against each other in a town or an area we will have to look at what is best for the overall group whether it be a JD, a Bradlows, an Ellerines, a Royal or an Oxford. *We have got so many brands to play with and the bridge of merger is if you go up the brand ladder the volumes increase.'* (our emphasis)

It is the second element of the definition – that the merging parties should face competition in the local market – that gives greater pause for thought. The parties insist that prices and credit conditions are set nationally – prices, they aver, are set by the head office managers of the respective chains, while credit conditions are set at group level within the strict parameters laid down by national legislation. This implies that the parties – both national groups comprising national chains of stores – do not respond to competition at the local level, or, conversely, that their key competitive strategies, including pricing and credit policies, are determined in relation to those of other national chains. Note, that the parties make this assertion when defining the relevant market and yet, in their assessment of the competitive impact of their transaction, claim that the regional independents loom large in setting limits to the potential exercise of market power on the part of the national chains. The implications of this inconsistency are explored more fully below.

The Commission argues that while national pricing *parameters* are clearly established, regional and branch managers are given considerable latitude to respond to competitive conditions at the local level. As the Commission points out, the parties conceded that, in the JD Group at least, every store manager may discount products down to cost plus VAT in order to take a sale away from a competitor.

Detailed econometric analysis may provide a definitive answer to this question. It is common cause that regional and branch managers have a degree of latitude in responding to local competitive condition. However in order to decide whether *competition* takes place within the geographic boundaries for which these branch and regional managers have responsibility we must rely on evidence demonstrating the precise extent of this local discretion and identifying when it is used. The JD Group has, in fact, provided detailed evidence suggesting that revenues earned from promotions and other discounted sales account for a relatively insignificant proportion of total revenues.

On the face of it, maintaining rigid national control of prices does not make commercial sense. It means effectively that the national chains are prepared to forego sales to the regional independents in order to maintain centralized national control over pricing and other key competitive variables. Surely it would be preferable to impose turnover or profit targets on local managers and allow them to compete on terms dictated by their local competition? After all, as already discussed, the ability of the consumers to physically purchase product outside of limited geographic boundaries is circumscribed by the nature of the product.

On the other hand, we have presented with persuasive commercial reasons for maintaining national control over or, at least, strict national co-ordination of these key competitive variables. Maintaining the integrity of the brand is one reason advanced by the parties; massive economies of scale in national advertising is another. Mr. David Sussman acknowledged that the national group gave up sales to local independents as a result of its insistence on maintaining a national competitive strategy. However, in Sussman's estimation, it would be 'absolutely impossible to manage a chain if managers were given greater discretion' – in his view 'absolute chaos' was the likely outcome of a decentralized approach to pricing. He noted that, in the absence of national controls, store managers and sales staff, who, he noted, were not entrepreneurs, would be tempted to secure each and every sale to the detriment of the interests of the overall business.[44]

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44 see transcript of Tribunal hearing of the 21 August 2000, pp. 21-3. Mr. Sussman's statement indicates clearly that he does not permit his managers to respond to competitive initiatives from local furniture stores: ''Sales people and branch managers would normally take the line of least resistance and just say 'oh

It is also possible – and this will be elaborated below – that this centralized strategy may simply reflect the market power of the national chains. In other words, despite the nature of the product, the market may be truly national and dominance by national brands over local markets ensures that the advantages of eliminating all local competition are outweighed by the costs of compromising the other advantages of a national approach to competition. Certainly the European Commission is comfortable with finding a national market in circumstances broadly similar to the case in point. In *Blokker/Toys 'R' Us*, the European Commission pointed out that "In earlier decisions concerning retail operations, the Commission has generally taken the view that retail markets can be defined as national under certain circumstances". It continued:

> "Although the catchment area of a retail outlet, which can be based on the distance a consumer is willing to travel to reach it, is of a local or regional scale, the catchment area does not necessarily determine the geographic market. In a situation where several retail chains operate networks of stores on a national scale, the important parameters of competition are determined on a national scale. Therefore, from the viewpoint of the catchment area, what may be a local or regional market has to be aggregated to a national market in these circumstances."

On the evidence before us, we conclude that the parties to this transaction do, indeed, set prices and key trading conditions nationally. The Executive Chairman of JD has specifically conceded that the group loses sales to local independents in order to maintain national control over its competitive strategies. While the parties have acknowledged that regional and branch managers have a certain discretion with respect to pricing, deviations from national prices have to be sanctioned at the national level and we have been presented with evidence that establishes that this only occurs in exceptional instances. In short, the parties acknowledge that they do not set prices and trading conditions in response to competition from local independents but only in response to other national players. The local independents do not then comprise part of the relevant national market.

Accordingly we find that the relevant market is the sale of furniture and appliances on credit to consumers in the LSM3-5 category through national chains of 'furniture shops'.

4.3 The likely impact on competition in the relevant market

We are enjoined by Section 16(1) of the Act to determine whether or not the transaction 'is likely to substantially prevent or lessen competition' in the relevant market.

A firm's market share reflects the amount of economic activity for which it is responsible in the relevant market. The US Supreme Court has declared that the "amount of annual sales is relevant as a prediction of future competitive strength" and is "the primary index of market power".[45] However, where the structure of the industry or special practices suggest that market share calculations based on sales

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well, to do business we had to drop our prices or we had to cut prices or we had to sell at cost plus VAT' and so on and so forth. So we discourage this to a very large extent."

45 See United states v General Dynamics Corp., 415 U.S. 486, 501 (1974) and Brown Shoe Co. v United States, 370 U.S. 294, 322 n.38 (1969)

figures would be misleading in assessing the impact of the merger, the US Courts, have also used other data, for example production and capacity figures, in order to calculate concentration.[46]

There are a number of widely accepted empirical indicators of market power. The most common among these is the Herfindahl-Hirschman index and the four-firm concentration ratios. Both are naturally heavily conditioned by the quality of the data used to calculate them and, above all, by the parameters of the relevant market.

The parties have presented us with two sets of HHI measures, the one based on the total furniture and household appliance credit market, the second based on the LSM 3-5 income group market (see tables 1 and 2 below) that, on their data, indicate relatively low levels of concentration and little change in concentration as a result of the merger.

Table 1: HHI based on total Turnover of Furniture and Household Goods:

Company	**Turnover R/million**	**Market Share**	**HHI Pre-merger**	**HHI Post-merger**	**Change in HHI**
JD Group	1,832	9.5	90.9	184.8	
Game/Dion	1,966	10.2	104.7	104.7	
Profurn	1,704	8.9	78.7	78.7	
Relyant	1,573	8.2	67.0	67.0	
Makro	1,450	7.5	57.0	57.0	
Ellerines	780	4.1	16.5		
Lewis	1,815	9.4	89.2	89.2	
OK/Hyperama	798	4.2	17.3	17.3	
Pick 'n Pay Hypermarket	650	3.4	11.4	11.4	
Independents	6 645	34,6			
TOTAL	**19,213**	**100**	**532.7**	**610.1**	**77.4**

Source: Commissioned by the parties from AC Nielsen

A major difficulty in agreeing upon sales figures is that the bases for calculating these figures differ as between the various groups with some reflecting turnover values based on cash price sales while others include finance and insurance charges in their turnover. According to AC Nielsen they scrutinised the annual financial statements of each of the listed groups for the financial year 1999 and extracted from that what they regarded as the common denominator in the definition of "turnover", that is sales at cash price.

There are a number of telling errors in the basic data used. For example, the Lewis figures are from their 2000 Annual Report while the others are all drawn from the 1999 Annual Reports. Moreover, the Lewis figures do not account for the fact that 90% of Lewis's sales are on credit, as stated in the GUS annual report. Assuming a finance charge income at 22% the correct figure should amount to R 1 303 million and not R1 815 million. Given that the figure for the independents is a residual calculated as the

46 United States v. Amax, Inc., 402 F. Supp. 956 (D. Conn. 1975)

difference between the official figure for total sales and those attributed to the groups cited in the table, the effect of this correction is to increase sales attributable to independents by a further R512 million.

Moreover there are certain stores that clearly do not belong in the relevant market – the 'right' to purchase from Makro is restricted to card holders and the Pick 'n Pay Hypermarket is a cash only store.

However, the HHI calculation in Table 1 is most severely distorted by a serious methodological error: The parties cannot, on the one hand, insist that prices and key purchase conditions are set nationally with minimal discretion given to the local managers, and, yet, on the other hand, insist that for HHI purposes the turnover attributable to the independents be included in the size of the market. Setting price nationally implies, per definition, and this is borne out by statements cited above, that the parties do *not* respond to local competition, that, in other words, it is *not relevant* in their market. It implies that those who set their prices nationally have accepted that a share of the market will always belong to the independents, because an all-out pursuit of the independents' sales would involve sacrificing the commercial advantages of centralization. It also has the potential of spilling over into a price war between the national chains. This scenario is not mere conjecture; it is established by the parties' own insistence that their competitive strategies are nationally driven. Stripping the independents out of the data used for calculating the HHI data raises it significantly.

Moreover, these HHI's measure concentration in a product market that we consider broader than the relevant market. In particular, as elaborated above, we have concluded that the appliance discounters are not part of the relevant market.

The second HHI calculation submitted by the parties is of the LSM 3-5 market. As already discussed the parties argue strongly for a single mass market. They have however submitted an HHI calculation of the LSM 3-5 in order to demonstrate that, even on this assumption, the HHI still reveals low levels of concentration.

Table 2: HHI based on total turnover of Furniture and Household Goods in LSM 3-5 market:

	Turnover R/million	**Market Share**	**HHI Pre-merger**	**HHI Post-merger**	**Change in HHI**
Lewis	1 815	22.9	525.0	525.0	
Profurn	530	6.7	44.8	44.8	
Relyant	712	9.0	80.8	80.8	
Ellerines	680	8.6	73.7	173.1	
JD	362	4.6	20.9		
OK	500	6.3	39.8	39.8	
Independents	3 322	41.9			
TOTAL	**7 921**	**100**	**785.7**	**863.5**	**78.5**

Source: Commissioned by the parties from AC Nielsen

However, this calculation suffers from the same methodological flaw as the single mass market HHI reflected in Table 1. That is, the independents are again included despite the parties' insistence that the market is national.

Second, is the surprising inclusion of the Lewis turnover in this data set. In evidence submitted by the parties themselves they have not seen fit to include Lewis in the LSM 3-5 rather placing them in the next market segment. In a later submission the parties indicated that, in their estimation, Lewis spanned the range of LSM 3 through to LSM 8. However for the purposes of this calculation all of Lewis' considerable turnover is placed in the LSM 3-5 range. Note Mr. Eric Ellerine's confident assertion cited earlier: 'We are the market leaders in the lower income group (LSM 3-5') – and yet for the purposes of calculating the HHI for this segment Lewis' turnover in this market is represented as three times higher than Ellerines![47]

Based upon this critique of the HHI calculations submitted by the parties, we have reworked the HHI for the relevant market, as defined in section 4.2 above, as follows:

Table 3: HHI based on turnover of furniture and appliance shops directed at credit sales in LSM 3-5 excluding independents:

Company	Turnover R/million	Market Share	HHI Pre-merger	HHI Post-merger	Change in HHI
Profurn	530	17.2	295.8	295.8	
Relyant	712	23.1	533.6	533.6	
Ellerines	680	22.0	**484.0**	**1135.7**	
JD	362	11.7	**136.9**		
OK/Hyperama	500	16.2	262.4	262.4	
Lewis*	300	9.8	96.0	96.0	
TOTAL	**3084**	**100**	**1809**	**2324**	**515**

Source: own calculation

* Note that, cognizant of Lewis' spread across the LSM segments, based on a cash sales turnover figure of approximately R1,3 billion, we have included a figure of R400 million for Lewis in our re-calculated HHI. This is an estimated LSM3-5 turnover figure for Lewis based upon a similar LSM3-5 sales to total sales ratio for Profurn.

A post-merger HHI above 1800 is generally considered to be highly concentrated. Mergers that produce an increase of more than 50 points as in the above calculation clearly raise significant competitive concerns.

The Competition Commission also calculated the HHI in its recommendation. However, it followed a different approach by calculating concentration based on the number of stores of each of the participants in the various local geographic markets excluding the independents. They identified 500 local markets but only calculated HHI's for a sample of 12 markets, 2 major cities in each province[48]. They conclude that in the 12 markets analysed the merged entity will have a market share of 60% in one market,

47 Note diagram in Appendix A. This was submitted by the parties and places Lewis outside of the LSM3-5 segment.

48 Johannesburg, Pretoria, Port Elizabeth, Cape Town, Bloemfontein, Pieter Maritzburg, Rustenburg, Nelspruit, Durban, Kimberley

between 50-60% in four markets and between 40-50% in four markets. In the remaining three markets, the market shares of the merged entity will exceed 30%.[49]

Another method used to calculate concentration is the four firm concentration ratio, CR4 test. It measures the portion of the market accounted for by a given number of leading firms, in this case the four leading firms. If we take the market shares of the top four companies in the LSM 3-5 as calculated in table 3 above the four top firms concentration figure would be as follows:

Table 4: 4-firm concentration ratio

Profurn	19,5%
Relyant	26,2%
Ellerines	25,0%
JD	13.3%
Total	**84%**

Source: Own calculation

The merged firm will therefore supply 38,3% of the relevant market. Competition authorities are, as a general rule, very sceptical of a merger where the combined share of the four largest firms will exceed 75% and the merged firm will supply at least 15% of the relevant market.

In summary, we have used various methods and information to calculate concentration in the relevant market and have found shortcomings and flaws in each of the methods used.

In the premises, given the widely disparate HHI calculations, we are not willing to place complete reliance on any of these measures. Nor do we believe that the HHI, even when a relatively straightforward calculation, should, on its own, constitute the basis for deciding on the outcome of a merger investigation. The HHIs are *indicative* statistical measures; they are not determinant. They must always be bolstered a deeper, qualitative enquiry in order to arrive at a realistic assessment of the impact of the transaction on competition in the relevant market.

Several factors serve to reinforce these statistical indications that the transaction has the potential to impact adversely upon competition:

49 The parties criticized the Commission's attempt to base its concentration measure on the number of stores, pointing out that this lumped together a large variety of distinct stores, conventional stores together with the considerably smaller satellite stores and the significantly larger super stores. While we agree that store numbers is not an ideal measure of concentration, if the market is national and, if one accepts that each of the national chains is similarly composed of store format varieties, then the measure should be seen as providing an indicative measure of concentration.

The first concerns our difficulty in identifying the very basis of competition between the national chains in the relevant market. We have perused the reams of advertising material submitted by the parties. It is unusually difficult to compare cash prices and this because the various participants in the relevant market appear to make a determined effort to bedevil any attempt to compare cash prices at one store with those offered by it various competitors. For example while the specifications of many of the brands on offer are identical the various stores appear to be at pains to ensure that they do not offer the same branded products as those offered by their competitors - television sets are a good example here. Or alternately the precise specifications of the advertised products are shrouded in names that disguise more than they reveal – lounge suites are a good example of this practice. As noted above, the manufacturers produce in-house brands for the large chains and this also bedevils inter-store price comparison. If price comparison has eluded the resources of a competition authority, we can only conclude that the average LSM 3-5 customer is in an even more disadvantageous position in choosing from among the apparently vast array of options on offer.[50]

On the other hand credit terms and conditions appear identical across the various LSM 3-5 chains. This is to be expected given the level of statutory regulation of credit terms and conditions to which we have already alluded. However, it appears that an area of considerable competition centers upon the relative ease of access to credit available through the various competing groups of stores. This factor, above all, appears to act as the principle instrument for attracting custom in the LSM 3-5 category.[51]

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50 Note that, in any event, consumer behavior in the LSM 3-5 market is not as responsive to price as the parties suggest. This is because in the typical sale the sale price is considerably less than the total cost to the customer. A typical purchase comprises the payment of a 10% deposit and then installments for the balance payable monthly over 24 months. Added to the sale price are-

- Delivery charges of R350.
- finance charges of approximately 22% of the principal debt (i.e. the sale price less the deposit)
- insurance (in Ellerines case 10,5% and in JD's 12% per annum of the sale price).
- Then JD but not Ellerines includes -
  - retrenchment insurance 6% of the outstanding balance (the principal debt plus finance charges) per annum; and
  - its magazine R 209.65 plus VAT.

In a working example prepared by Investec on two goods both with a sale price of R4999 the total cost to an Ellerines purchaser is R7968,82 a monthly installment of R332.03. The total cost to the JD customer is even more at R 8060,49, a monthly installment, of R391.75 . Investec arrives at two conclusions. JD with its additional expenses could charge R1000 less on the sale price and the consumer would still pay the same monthly installment as that charged by Ellerines. More importantly they say that Ellerines insurance charges are lower than the rest of the industry and they could profitably raise them from 10,5 % to 17,5%. If Investec is correct, this on its own is an indication of the potential for market power to be exercised post merger more so if JD is already able to charge 18% on insurances pre-merger. The following statement from the JD Group Board meeting of the 24 May is testament to the anti-competitive potential of this opaque method of pricing product: '(Mr. Strauss – the JD MD) noted that *other income levels at Ellerines could be boosted by at least 5% by the introduction of retrenchment insurance, furniture club membership fees and extended guarantees'*.

51 Note Raphael Kaplinsky and Claudia Manning – Concentration, Competition Policy and the Role of Small and Medium-Sized Enterprises in South Africa's Industrial Development (Journal of Development Studies, Vol. 35, No.1, October 1998): 'Several of the (furniture retail) chains' marketing directors – whom we interviewed – ….informed us that black consumers (the main users of consumer credit) are not 'price sensitive', since they are primarily concerned with getting access to credit..'(p153-4)

However, easy access to credit is clearly a drawcard that has to be managed with consummate care – several major chains have already fallen prey to the dangers of a poorly managed debtors book. While all of the key players in the LSM 3-5 market offer credit on relatively easy terms, Ellerine's longstanding reputation for granting entry level credit and the quality of management of its vast debtor's book is unparalleled. Moreover the unusual strength of Ellerine Holding's balance sheet – primarily because, in contrast with the other national chains, it has not been an aggressive acquisitor, it is ungeared - enables it to extend consumer credit with considerably greater ease than its competitors.

Secondly, and this has a strong relationship to the use of credit facilities in this segment of the retail furniture trade, there is the question of brand loyalty. Brand loyalty here refers to the observed tendency of customers to remain with a single chain or, at least, within a single group of chains. The parties have questioned the extent of brand loyalty but this is at odds with other assessments of customer behaviour in this sector, many of which specifically refer to evidence of strong brand loyalty.[52] A common sense reading of the furniture retail trade would favour those who identify strong brand loyalty – credit accounts for much including a strong interdependence between debtor and creditor.

The upshot is that in acquiring Ellerines, the JD Group does not merely acquire one of the country's best retail brands and the various material assets owned by the company – it actually acquires customers in the form of the large debtors book and, moreover, customers who are likely to remain loyal to the acquiring party. Furthermore, because of the observed, and perfectly understandable tendency (arising again out of the nature of the credit) of *group* (as opposed to mere brand) loyalty the acquisition of Ellerines will not only increase JD's customer base at the LSM 3-5 segment but will provide it with customers who are liable, in Mr. Sussman's words, to 'migrate upwards' to other brands in the group. This is why brands in the lower segment are referred to as 'entry level' brands and those in the higher segments as 'aspirational'.

We should underline that the loyalty described above is not to be taken for granted in most merger transactions – on the contrary competition regulators are generally able to assume that a combined entity will *lose* a certain proportion of its combined customer base to existing competitors. In this case, however, the likelihood is that the merged entity will not only retain the combined LSM 3-5 customer base but will also simultaneously increase the customer base for its higher segment brands. This unusual outcome derives from the fact that the Ellerine's customers and those of Price 'n Price and Score, JD's existing LSM 3-5 stores, are poor people with highly limited access to credit, subject, in other words, to a powerful incentive to remain with those from whom they have already received credit.

Thirdly, we do not share the parties' assessment that entry barriers are low. Information submitted by the parties establishes that the introduction of new national store brands is, by and large, the effective prerogative of the existing national chains.[53] This is not surprising. The economies derived from

52 Diverse sources remark upon the extent of brand loyalty in this trade. See, for example, the Commission's submission and also the Fleming Martin report on the sector. See also the divisional review of Protea Furnishers in the Profurn Annual Report: 'The division furthermore boasts a total of 340 000 accounts or customers *of which 40% contribute to repeat business.'*

53 Nor should the difficulty of establishing new brands, even for the established groups, be underestimated. A glance at the length of time for which many of the established furniture brands have been in existence (see profiles of the groups presented above) bears testament to the difficulties that new entrants will face. On

membership of a large, established group are clearly considerable and relate, most obviously, to IT costs, advertising, supplier discounts and warehousing expenses. The ease with which the established groups are able to open new stores within an established brand must act as a significant deterrent to would be new entrants who, on the evidence presented, would have every reason to expect that any lucrative market will soon attract one of the established brands. Store leases, we are told by the parties, are generally of five years duration and so the sunk cost are significant.

Above all new entrants are constrained by the requirements of running a large debtor's book. The parties assert that this entry barrier only pertains to an entrant that wants to run its own debtors book and it notes the availability of credit from other financial institutions, including some dedicated to providing credit to purchasers of furniture. However, we are persuaded by the evidence gathered by the Commission to the effect that this credit is both limited, a veritable drop in the ocean compared to the parties ability to extend credit, and costly.[54]

The remarkably high margins, particularly in the LSM 3-5 range, are themselves indicative of market power and of high barriers to entry. Ellerine's gross margins are 53,5%. In the LSM 3-5 brands the JD Group's gross margins are 44% and in the LSM 6-8 they go down to between 27% and 33%. We accept that the margins reflect the exceptional degree of risk that the participants are willing to assume in this low income, credit-based market. But they clearly establish that not many others are willing to assume this risk even at margins strikingly higher than those generally available in the retail trade. Pick 'n Pay's response to the Commission to the effect that it would only consider entering this market if prices went up by 10% is indicative of the hurdles that even this experienced and well resourced retailer perceives in the low income furniture market.

Finally, there is no doubt that the transaction results in the removal of an effective competitor. As already noted David Sussman himself has been at pains to acknowledge the strength of Ellerines. The Financial Mail reports: "At JD they regarded Ellerines as serious rivals. 'In the market we're their biggest rival', says Sussman. 'We weren't as concentrated at the entry level (lower end of the market) as Ellerines are. But we were really slogging it out toe to toe'"

We accordingly find that the transaction is likely to substantially lessen competition in the relevant market. This conclusion is based on the share that the merged entity will have of the LSM 3-5 market in combination with the role played by credit allocation in attracting and maintaining a customer base, Ellerine's unusually powerful position in the business of granting credit, high levels of brand loyalty, high barriers to entry, and that fact that the transaction will result in the removal of an extremely effective competitor.

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the other hand the Commission's sample survey of independents and their inability to even track down a significant proportion of those in a large sample indicates that new entrants are subject to a high failure rate and tend to exit very rapidly.

54 See Commission's presentation to the Tribunal hearing of the 10 August 2000. Credcor, the largest source of credit for customers of the independents, has a debtors book totaling R90 million in respect of furniture and appliance retailers, while the parties alone have a combined book of the R2,8 billion. Moreover, Credcor derives its income not only from interest on the credit it extends but it also levies a fee on the retailer thus raising the cost of credit sourced through Credcor. Furthermore, the Commission avers that the credit checks imposed by Credcor are stricter than those applied by the parties.

We should note that we give no credence to the notion that because the Ellerine's brand will be retained it will continue to provide the same level of competition to the existing JD brands. Although different brands, they will be subject to a single controlling mind and to view them as competitors for anti-trust purposes is without precedent and, we respectfully submit, good sense.[55]

4.4 A note on the independent furniture retailers

We have identified South Africa as the relevant geographic market. The effect of this is to exclude the local independent stores from the relevant market – as already elaborated, the parties themselves aver that they do not respond to competitive initiatives from this quarter. However, despite the glaring inconsistency in their approach, the parties nevertheless attempt to make much of the alleged competitive presence of the independents.

The Commission, for its part, finds local geographic markets but then, also exhibiting a certain inconsistency in its approach, finds that the independents are not a significant source of competition in these markets.

Our finding that the relevant market is national relies principally on evidence submitted by the parties. We accept, as outlined above, that there are rational commercial grounds why large national chains should value centralized, national determination of their key competitive strategies and, conversely, why they should not respond to initiatives from the local independents. However, if this issue is examined from the perspective of the current competitive strength and future prospects of the independents, then it is not difficult to see why they are all but ignored by the participants in the relevant market – the large national chains – in the preparation of their competitive strategies.

There appear to be two types of independent operators. The first, the vast majority, operate a conventional store format . The second operate a very large super store format. Some of the independents group two or three stores but most are single store operations. They are owner-managed enterprises.

The evidence gathered by the Commission regarding the former grouping of independents is striking. The parties informed the Commission investigators that there were 1251 independents in the 99 local markets in which both parties compete. A survey conducted by the Commission of 202 of these independents in the Eastern Cape, Northern Province and the Free State established that 93 were no longer in business, 12 were not in the relevant product market, and four declined to respond to the Commission's queries. Of the remaining 93 only 13 – 6,5% of the sample surveyed - serve the low-income market and provide credit.

The parties also referred to Furnex, a company that buys products and obtains financial services on behalf of its members all of whom are independent retailers. The parties argue that Furnex's collective

55 The parties have stated that the base price of products in the JD Group is the same for each business unit in the Group. (Par 5.2.4.1 of their filing made on 3rd August) This contradicts their assertions elsewhere (Par 5.1.12) that individual units compete with one another.

buying power constitutes its members as a real competitive threat to the large national chains. We disagree. Furnex's members may be able to use their collective purchasing power to reduce the cost of their product, but there is no indication that firms graduate from Furnex membership to become significant chains. Indeed each Furnex member controls, on average, a trifling 1,5 stores.

The parties made much of the competition from the large format independents. They provided four examples. Although found in very few areas, these are undoubtedly very large stores. However these stores are a particular manifestation of South Africa's past and the conditions for expansion of these stores and for new entry by large format independent have disappeared.

The four stores used by the parties are indicative of this. They are owned by Indian entrepreneurs whom the Group Areas Act confined to particular locales of the large rural towns in which they are all based. These were generally located in proximity to the transport routes from the African townships, precisely the sites now favoured by the parties and the other large national chains in the low income segment of the market. These stores, managed by extremely able entrepreneurs, were prevented by the Group Areas Act and by restrictions on raising capital, from expanding out of their prescribed bases. Had they not been restricted by apartheid they may well have been in the position occupied today by the parties to this transaction. However, the unfortunate truth is that they remain confined to their original bases, they remain family-owned and managed with all the limitations that implies for rapid expansion, and they now have to contend with added competition from the multi-store chains. We asked the parties whether any of the stores cited by them as examples of large independent super stores had been in existence for less than 10 years. They have not been. We would indeed be surprised if any had been in existence for less than 20, even 30 years. This confirms that new entry at this scale of operation is not feasible. This, combined with the obstacles in the way of expansion on the part of the existing players, leads us to conclude that they are, at most, significant in a small number of regions and that the extent of competitive pressure from this source is, if anything, likely to decline rapidly.

4.5 The Impact of the transaction on the manufacturers of furniture

A constant refrain running through the investigation and evaluation of this transaction concerns its possible impact on relations between, on the one hand, the manufacturers of furniture and, on the other, the retailers. Various concerns have been expressed: more powerful retailers, operating in a less competitive retail market, are better able to squeeze the profit margins of the manufacturers; the preponderance of large national retail outlets with centralized purchasing departments inevitably means that the volumes ordered will exceed the capacities of the smaller manufacturers; the close relationship alleged to exist between the JD Group and the Steinhoff Group, much the largest manufacturer of furniture in South Africa, would further underpin the progressive exclusion of the smaller manufacturers from large parts of the market; the additional purchasing power of the new group combined with its allegedly close relationship with Steinhoff would give JD a competitive edge over other furniture retailers.[56] [57]

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56 Cf. footnote 2, above. This provides evidence suggesting that the JD Group already received payment terms from the manufacturers that are preferable to those available to the other chains.

57 Note Kaplinsky and Manning (op cit) whose analysis of the industrial structure of the furniture manufacturing industry bears out many of these fears: 'The retail chains we interviewed all informed us that they could not source from small producers because the latter could not produce sufficient quantities. Consequently the bulk of the retailers' purchases came from large enterprises.' This research them bears

A group of small furniture manufacturers submitted a statement of their concerns to the Commission. However, they requested that they not be identified and the Tribunal has accordingly had no regard to their statements.

The parties, for their part, have furnished the Tribunal with more than 120 letters from manufacturers expressing support of the transaction. A Commission investigator has submitted an affidavit in which she attests that certain manufacturers have reported (and again declined to be named) that they were pressurized by senior representatives of the parties to submit these letters. The parties have denied these allegations. The Tribunal must again decline to accept anonymous submissions, though it records that the alacrity with which the manufacturers responded to the request for support and the near unanimity of the response ((there was a single detractor) suggests that the parties do command a not inconsiderable degree of power vis a vis the manufacturers.

However given that we could not rely on the anonymous grievances submitted, this issue has not influenced the outcome of the Tribunal's evaluation of this transaction. We do note though that the purchasing power – market power, in other words – of the large retailers vis 'a vis the smaller producers is cause for concern and calls for vigilance on the part of the competition authority. We also note the parties' undertaking to maintain existing supplier relations.

4.6 Pro-competitive gain

The parties have not identified pro-competitive gains in the relevant market. On the contrary, as already noted, Mr. Sussman has been at pains to distinguish this transaction from previous acquisitions by the JD Group. In the other transactions JD acquired ailing chains and turned them around. These pecuniary gains have not been claimed in this transaction, where the target company is identified as a well managed, thriving group.

The only efficiency claims made are in respect of the parties' activities in financial services. These are examined under public interest.

4.7 Public Interest

In undertaking a merger evaluation we are enjoined by Section 16(3) of the Act to consider specified public interest issues. Where, as in the case, the merger has been found to diminish competition, we enquire whether a positive impact on public interest outweighs the negative impact on competition, thus permitting approval of the merger. Note that the Act specifies the public interest grounds that the Tribunal may consider these being the impact of the merger on a particular sector or region, on employment, on the ability of small businesses and firms controlled by historically disadvantaged persons to become competitive, and the ability of national industries to compete in international markets. Note too

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out the central argument in their paper, namely, 'that the process of retail concentration serves to undermine the market access opportunities of smaller producers.' (p152-3)

that the mere existence of a public interest ground is not enough in itself. The Act requires the public interest ground to be substantial.

In this merger the merging parties have, whilst not conceding the merger is anticompetitive, raised under the public interest rubric an aspect of the deal affecting their respective financial service arms, which they say, is in the public interest.

4.7.1 Financial Services

The parties have raised the increase in their ability to offer financial services as a public interest ground in that they are helping bank the "unbanked".

They say that with an increased store base of approximately 1250 outlets in SA they will be in a better position to do so. They also stated that certain stores could be converted into franchises particularly in the Electrical Express Chain and that this would be beneficial for small business and create employment opportunities.

All these objectives are very laudable, but what we have to assess is whether the parties require the merger in order to implement them. Nothing the parties have told us suggests they cannot implement these strategies without the merger.

We turn first to the claims regarding financial services and note at the outset that it is not clear under which of the specified public interest grounds this claim is made. However, that having been noted, we will nevertheless proceed to examine the substance of the claim.

The parties claim that the additional store base will lower the costs of rolling out their financial services arm. However, both Ellerines and JD have extensive and often overlapping networks of stores. Neither party needs a merger to reduce the costs of rollout.

Nor do they require the merger to increase their ability to raise capital. Both have already embarked on expanding into financial services prior to contemplation of the deal and are already operating divisions, have marketing strategies in place and, in the case of Ellerines, have developed a separate brand in Rainbow Loans. If anything the market for these loans will become less competitive if two competitors providing these products are merged. We do not base our decision to find the merger lessens competition on this, we merely use this to reject the suggestion that the merger brings with it a substantial public interest.

In short, the parties do not need this merger to enter this market - they have already entered and are better resourced than most to sustain that entry.

The suggestion that these activities bring banking to the unbanked must also be treated with some skepticism. The financial services offered do not replicate the traditional services of the banking sector i.e. local branches for savings accounts etc, that is, they do not 'bank the unbanked'. They extend credit and stimulate consumption – they do not facilitate or encourage savings. Moreover, as the evidence of the parties clearly indicates, micro loan schemes are ubiquitous and there is no suggestion that these services, as opposed to the more traditional banking services, are not getting to the "unbanked".

As to the suggestion that the parties may involve themselves in franchising, although not stated expressly we assume the motivation is based on 16(3) (ii) and (iii) of the Act, which deal respectively with employment and the ability of small business and businesses owned by HDI's to become competitive. The

'offer' to promote franchising is vague. Moreover, we should point out that franchising is a business strategy aimed at spreading risk and we presume that this would be the basis of a decision to franchise certain brands. Franchising will not be embarked upon in order to promote the public interest. Furthermore if the parties wish to pursue franchising there is no apparent reason why this is contingent upon the merger.

4.7.2 Employment

Undertakings were made to the employees and we are satisfied that the merger raises no concerns on this ground

4.7.3 Other Public Interest Grounds

None of the other public interest issues were raised by either the merging parties or the Commission and so we do not need to consider them.

4.8 The Proposed Conditional Acceptance

The Commission initially recommended prohibition of the transaction. However, it subsequently reconsidered its position and has recommended that the transaction be approved subject to a number of conditions. Although the parties do not admit that their transaction will substantially reduce competition and, accordingly, that the imposition of conditions is warranted, it has agreed to accept the conditions in order to secure approval of the transaction.

The panel is empowered to approve the transaction conditionally. We will, accordingly, examine the proposed conditions.

The core condition is that, within 9 months of the date of approval of the transaction (or, with the Commission's agreement, a further 3 months), the merged entity will divest itself of 150 stores in the LSM 3-5 category. The stores selected for divestiture must be acceptable to the Commission. The purchaser shall preferably be a Black Economic Empowerment Group approved by the Commission, or, failing that, another buyer approved by the Commission. Furthermore, once the stores are selected for divestiture, the merged entity undertakes to manage the chosen stores efficiently 'so as to ensure that the new purchaser shall become a viable competitor of the JD Group after the sale by the JD Group'. The statement of conditions submitted by the Commission specifically records that, in determining the identity of the purchaser, 'its ongoing viability must be paramount'. The Standard Bank will be appointed at JD's expense to monitor compliance with the conditions.

Finally, it is noted that, 'Section 14(5) shall be applicable to all the aforesaid conditions'. Section 14(5) allows the Commission to revoke its decision to approve or conditionally approve an intermediate merger, in the event of, inter alia, a breach of any obligation attached to the decision.

A number of other conditions relating to employment and the parties' involvement in financial services are proposed. However, important though they may be, they do not impact on the competition concerns that have led us to prohibit the transaction. Accordingly, the imposition of these conditions would not cause us to reverse our finding. However the conditions relating to the divestiture of certain of

the stores in the portfolio of the merged entity are manifestly intended to address the competition concerns arising from the merger. We will accordingly confine our decision to these conditions.

Turning to the substantive conditions proposed, we note that it is not uncommon for the competition authorities or the courts in other jurisdictions to impose divestiture as a condition for the approval of a merger. Under the previous competition law regime in South Africa divestiture agreements were struck in the context of merger investigations. There are many examples of successful divestiture arrangements, that is, divestiture arrangements that have permitted a revised transaction, one that meets the requirements of both the parties and the competition regulators, to go ahead. Merger regulation must recognize that many mergers are efficiency enhancing and, in general, part of the legitimate conduct of business. Accordingly, if an anti-competitive merger can be 'rescued' by excising those aspects that generate concern, then the Commission and the parties are encouraged to seek out these solutions. Furthermore, a structural solution such as divestiture, is generally to be preferred to a behavioural condition that requires constant monitoring by the competiton authorities or, expressed otherwise, ongoing regulatory intervention in the affairs of the merged entity.

However, not every anti-competitive merger can be cured by a divestiture order. Or, conversely, it is not simply any divestiture order that will cure an anti-competitive merger. The finer details – the precise assets to be divested, the identity of the purchaser, the price, the length of time taken to effect the divestiture, the post-divestiture relationship between the merged and divested entities – are all important. However, the conditions proposed here contain only the barest of detail. On the other hand there is persuasive evidence that suggests that a divestment has only a slim prospect of overcoming the anti-competitive consequences of this transaction.

The litmus test of the effectiveness of divestiture is whether it maintains competition in the post-merger relevant market, or, in the language of the Act, whether or not it permits of a transaction that does not 'substantially prevent or lessen competition'. The Federal Trade Commission holds that

> *"The order, the divestiture contract, the buyer and the buyer's business plan should be evaluated in terms of whether the divestiture will restore competition in the complaint market. This means that the divested entity must have the same potential and incentives to expand and innovate as the firm that disappeared. It should not be a firm that has continuing dependency on the respondent or that is frozen in a static product or locked in a narrow competitive niche."* [58]

In other words, the practical measure of the effectiveness of a pro-competitive divestiture is whether or not the divested assets constitute the basis for introducing a new competitor into the market, or for strengthening the competitiveness of an established participant. This test imposes a conflicting set of incentives on the merging parties – on the one hand, they are eager to proceed with the transaction and are, therefore, encouraged to find a buyer who meets these criteria; on the other hand, they would not wish, in the process, to create a powerful new opposing competitive force, to sow, as it were, the potential seeds of its own future destruction.

The Competition Commission is clearly cognizant of these considerations, of these conflicting incentives. This is presumably why the Commission makes much of the requirement that the purchaser of

58 Federal Trade Commission (1999) – A Study of the Commission's Divestiture Process (p.37)

the divested assets be 'viable', why the merged entity is specifically enjoined to facilitate the viability of the purchasers, and why a merchant bank is employed to ensure that these conditions are respected.

However we are not persuaded that these conditions reverse the dangers to competition that have caused us to prohibit the transaction.

Firstly, precious little detail has been provided. Indeed there is as yet simply no detail to provide. With respect to the assets divested it is clear that the value that attaches to the stores is to be found in the brand or brands, the staff and the management systems, the debtors book, and, to a varying extent, the store leases.

On the face of it, there is nothing to suggest that a chain of this size and this structure will be viable. Certainly there is no successful role model. The other national chains, against whom the new entity will compete, all have LSM 3-5 interests larger than that represented by the 150 stores and, possibly more important, all have major interests in other segments of the market. It is suggested by the parties themselves that even Ellerine's Holdings, with its powerful LSM 3-5 stake, suffered in consequence of its limited presence in the other market segments. It will lack the purchasing power that brings its competitors critical advantages on the supply side and it will lack the diversity that allows the other chains to view its LSM 3-5 brand as its entry level clients ultimately to be 'migrated' into the lower risk, cash-oriented segments of the market. In our view the stake offered is at once too small and too undiversified to compete successfully against the established retail groups.

However, it is simultaneously too large to be managed by interests with no experience of this highly specialized and risky trade. A strong conclusion of the Federal Trade Commission's review of its experience of divestiture conditions is that 'the most successful buyers are the most knowledgeable. Buyers who are making geographic extension mergers of ongoing businesses are the most successful'.[59] In this instance nothing is known of the prospective purchaser except that a Black empowerment group is preferred. The only significant Black ownership in the furniture retail trade is to be found among the few large independents and a sale to these interests may be the only way of ensuring that these assets remain competitive. We have, however, been given no indication that any of these parties may be interested, nor do we envisage that the new JD Group will respond enthusiastically to the prospect of selling to one of these companies.

A certain level of experience will be available to the new owners if the current management of those stores and the brands that are sold is retained. However, there are solid grounds for skepticism here. The key managers of the sold assets clearly enjoyed substantial career prospects when their stores and brands were under the umbrella of one of the large, expanding chains. This prospect is now eliminated and even if the merged JD/Ellerines Group behaved in good faith and resisted the temptation to poach the best of the staff, there is no reason to expect the competitor chains to play by these rules. We note that the parties have assured us that they will put in place an ownership incentive scheme aimed at retaining key personnel but the success of this scheme will depend crucially on the staff's assessment of the potential of the new group.

59 op cit p38

Moreover, and possibly more important, the skill, experience and entrepreneurship of the group leadership clearly makes a powerful contribution to the competitiveness of each of the brands. Mr Sussman, himself, observes that his branch and regional managers are not entrepreneurs and that it is partly for this reason that key decisions over pricing and credit are made in head office, frequently in the group head office. Other key aspect of the infrastructure of management – some, like JD's sophisticated IT system, very costly and skill intensive – are centralized in the group. It is unlikely that these will be available to the new entity post-divestiture and, from a competition perspective, nor is it desirable for two competitors to be sharing these critical competitive resources.

A purchaser that may successfully overcome all of these problems could come from one of the existing national furniture chains, although this is unlikely to meet the test of maintaining competition at pre-merger levels. A retail chain not currently involved in the relevant market would be well placed to manage the chains. However, there is no indication of any interest from this quarter and it is unlikely that the assets on offer are of sufficient size to attract interest from one of the large retail chains. For a Pick 'n Pay or Shoprite or Massmart intent upon entering the furniture retail trade, Ellerines Holdings itself may constitute an attractive purchase. However, there is no reason to expect that the assets on offer will attract interest from this quarter.

Nor will the lengthy time period allowed for the divestiture enhance the prospect of a competitive new entrant. Again the Federal Trade Commission's experience is apposite:

> *"In order to eliminate competitive harm, the Commission has greatly shortened the period by which a required divestiture must be completed in more recent orders. The working rule now is that the divestiture must be accomplished within six months after the consent order is signed. Earlier orders typically gave the respondent 12 months or more from the date the order became final to divest. To further reduce or eliminate interim harm by obtaining quicker divestitures, recent orders have required 'up-front' divestitures. The up-front divestiture not only reduces the opportunity for interim competitive harm by expediting the divestiture process, but it assures at the outset that there will be an acceptable buyer for the to-be divested assets."*[60]

In this instance concern regarding the 9-12 month period permitted for the divestiture to take place also goes to the potential impact on the viability of the divested assets. We note that the Commission proposes that the conditions to be imposed require the merged entity 'to manage these stores efficiently and according to sound business practices'. We also note that the Commission asks that a merchant bank be appointed at the merged entity's expense to monitor compliance with this and other conditions.

While we note the JD Group's acceptance of these conditions and do not question its sincerity in making the undertaking, we do not believe that it is capable of fulfillment. We have little doubt that those basic, visible factors that influence the competitiveness of the assets to be divested will be maintained in place – we are confident that advertising spend will be maintained, that relationships with suppliers will be kept in place, that the stores will remain price competitive, and that the debtor's book will be effectively managed.

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60 op cit p39. In the case of an order requiring an up-front divestiture the merger may not be consummated until an acceptable buyer is found and the buyer has conducted a due diligence and submitted its business plan to the competition authority

However there is much that cannot be observed and it has to do with the way in which the JD Group manages the stores that it will *not* be divesting. The new JD Group will be intimately familiar with the stores to be divested. It is bound to manage its own assets strategically so as to blunt the competitive impact of the divestiture on its own performance. We cannot accept that JD, renowned for its robust competitive presence, would behave any differently. Nor can this be easily observed. To attempt to monitor JD's conduct in this regard would require a degree of intervention in its affairs that we would not wish to impose upon its management. And, in any event, given the 'information asymmetry', the disparity in the information to which the monitor and monitored would be privy, it would simply not be possible to vouch for JD's compliance in this regard.

Accordingly we find that the conditions relating to divestiture that are proposed by the Commission and that have been accepted by the parties do not reverse the anti-competitive effects of the transaction.

We considered the possibility of imposing additional conditions but have not been able to identify any that would reverse the anti-competitive consequences of the transaction. Acceptable conditions hinge critically on the viability of the divested assets. In order to assess this, the conditions would have to incorporate a considerably more developed description of the assets involved and of the purchaser. The divestiture would also have to be accomplished in a considerably shorter time frame than that permitted here. The Tribunal is clearly not able to develop a set of conditions at the required level of detail. This would have to be negotiated between the parties, the Commission and an identified purchaser. We note here that the panel had proposed to the parties and the Commission that we postpone our decision in order to allow the parties to identify a buyer and develop a more detailed set of proposals. However, this was not acceptable to the parties.

We note the specific reference to Section 14(5) (more correctly Section 15(3)) of the Act and the view of Mr. Katz, for the parties, that, any risk arising out of non-compliance (for example, the failure to find a viable purchaser) resides with the parties given that, in the event of a breach of the conditions, the right to withdraw the approval is retained by the competition authority. We are however not persuaded by this argument. It would not be possible to unwind this transaction a possible full year after its consummation. This path portends massive uncertainty, an extremely burdensome supervisory task for the competition authorities, likely litigation and the effective imposition of a shackle on the competitive process.

We emphasise that our conclusion is based on the facts of this case and on the conditions proposed. It does not, in any sense, suggest a general hostility towards conditional approvals or the place of divestiture in these conditions.

_____ 30 August 2000

D.H. Lewis Date

Concurring: P. Maponya and N.M. Manoim

Case No: 23/LM/May01

In the large merger between

Schumann Sasol (South Africa) (Pty) Ltd

and

Price's Daelite (Pty) Ltd

REASONS FOR THE TRIBUNAL'S DECISION – NON-CONFIDENTIAL VERSION

Decision

1. The Competition Tribunal prohibited the merger between Schumann Sasol (Pty) Ltd (SCHS) and Price's Daelite (Pty) Ltd (PD) on 1 July 2001. The reasons for the decision follow.

The Proposed Transaction

2. Schumann Sasol (South Africa)(Pty) Ltd (SCHS), the primary acquiring firm, will acquire the entire issued share capital of Price's Daelite (Pty) Ltd (PD), the primary target firm. The shareholders of PD will transfer the entire issued share capital of PD to SCHS.

3. Schumann Sasol International Aktiengesellschaft holds 100% of the shares in SCHS. The ultimate holding company of the Sasol Group is Sasol Limited. SCHS does not have any subsidiaries.

4. The Leo Goodman Family Trust owns 62,6% of the issued share capital in PD. The Leo Goodman Family Trust also controls Cambridge Candles. PD has no subsidiaries but it does control Price's Candles (South Africa)(Pty) Ltd and Price's Candles (Natal) (Pty) Ltd.

5. SCHS previously disinvested from the candle manufacturing market in 1995 by selling its business known as Price's Candles to the Goodman family because, it avers, it wanted to end the situation of being both a major supplier and competitor in the same market as its customers.

6. The effect of the current transaction would be to return the parties to the situation that they were in before the Goodman family purchased Price's Candles from SCHS in 1995.

7. The transaction, according to the parties, is the unavoidable consequence of the financial situation of PD, which is heavily indebted to SCHS, and the unresolved disputes between the parties. The parties aver that the transaction is to be viewed as part and parcel of a settlement agreement resolving the disputes between SCHS and the Goodman family.

8. SCHS avers that post the transaction PD will continue operations as an independent subsidiary of SCHS with full profit and loss responsibility. Its Board will consist of the Chairman and the Managing Director of SCHS and the Managing Director of PD.[61] According to the parties SCHS will supply PD with wax on an arms length basis.

The Analysis

Vertical Mergers and Competition Law

9. We are evaluating a transaction between two firms in a vertical relationship: SCHS, the acquiring firm, supplies candle wax to the target firm, PD, a candle manufacturer. We emphasise this at the outset because our analysis will proceed cognizant of, and in general sympathy with, the characteristically permissive approach taken by anti-trust to vertical mergers, indeed to vertical agreements generally.

10. It is relationships between competitors – that is horizontal mergers (and horizontal agreements generally) - that tend to attract the immediate attention of anti-trust enforcement. Vertical arrangements do not, on the face of it, lessen competition in either of the markets in which the contracting parties are active. On the contrary, a strong body of opinion holds that vertical arrangements are frequently competitiveness enhancing, that is, far from diminishing competition, these arrangements actually enable the contracting parties to produce or distribute a better or lower priced product or service. In general then, it is argued, anti-trust proscription of these arrangements confuses the requirement to defend competition, with action essentially designed to defend competitors.

11. However, the Competition Act, in common with competition statutes elsewhere, does cover vertical mergers. It does so because it is widely recognized that, under particular circumstances, vertical mergers may impact negatively on competition. Alarm bells will sound where one or both of the parties to the transaction dominate the markets in which they operate.[62] We shall elaborate the reasons underlying these concerns below. Suffice to note that while a vertical transaction

61 After the conclusion of the hearings into this matter, SCHS tabled an alternate structure for the post-merger decision. In terms of this structure a holding company would be incorporated in South Africa with SCHS and PD reporting to the holding company. Although briefly discussed at the hearing, the details pertaining to the post-merger structure of the companies have not influenced our decision in any material respect.

62 William G. Shepherd, *The Economics of Industrial Organization*, 4th Edition, 1996, page 388 and on page 277 Sheppard states that "high market shares raise a presumption that the social costs of a vertical merger exceed the benefits."

involving a dominant firm portends a variety of potentially anti-competitive outcomes, for the purposes of the present transaction it is the prospect of increased entry barriers[63] as well as the possibility of market foreclosure[64] and the related ability to raise rival's costs[65] that are of most immediate concern.[66]

12. It is frequently pointed out that the decision to integrate vertically is a business decision generally made to enhance the efficiency, the competitiveness, of the product or service brought to market. A manufacturer may, in order to secure a reliable source of input, or an improved input, freely elect to provide the input itself. By the same token, a manufacturer anxious to ensure effective distribution of its product, may freely elect to handle distribution itself rather than entrusting it to a third party. This argument is, for the most part, unimpeachable, but it still does not eliminate the necessity for regulating vertical mergers. By analogy, firms are encouraged to expand horizontally in their chosen markets through the pro-competitive provision of superior products but may nevertheless be restrained from expanding through merging with their competitors. By the same token, although a firm's, even a monopolist's, pursuit of 'internal' vertical integration may excite little anti-trust concern, there may nevertheless be solid anti-trust grounds for proscribing an attempt to integrate vertically through the merger process. Anti-trust scholars, Areeda, Hovenkamp and Solow, identify several reasons for adopting a less sympathetic approach to vertical integration through mergers than through internal expansion.[67]

13. What the literature does clearly reveal is that, as with much of anti-trust adjudication, the impact of a vertical merger on competition is acutely sensitive to the facts of the case. At the level of general principle, it is fair to say that vertical mergers raise fewer competition concerns and generates larger pro-competitive gains than their horizontal counterparts. On the other hand, it may be credibly claimed that vertical transactions in which one or both of the parties dominate their respective markets are liable to raise greater anti-trust concerns than those involving firms with

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63 The ease with which new firms can enter has been recognized as an important consideration in evaluating the ability of existing firms in a concentrated industry to increase prices above competitive levels. See Antitrust Law Developments Volume I (third edition) page 307.

64 Traditional foreclosure theory posits that a vertical merger may foreclose new entry at one level of production or service by eliminating potential purchasers or suppliers for a potential entrant and thereby making it necessary to enter at two levels in order to succeed – Antitrust Law Developments, fourth edition, Chapter IIIC, page 352.

65 Raising rivals' costs is described as a form of non-price predation carried out by raising rivals' supply cost, rather than the traditional predatory tactic of reducing their output price by flooding the market - *Understanding "raising rivals' costs"* by Timothy J. Brennan, Antitrust Bulletin Spring 1988.

66 For a summary of the economic consequences of vertical mergers and possible substantial impairments of competition arising from these transactions see Areeda, Hovenkamp and Solow – Antitrust Law Vol. IVA pp 142-144. In addition to foreclosure, price discrimination and increased entry barriers, they identify the following possible threats to competition arising from a vertical merger: supply preemption in times of shortage, the facilitation of horizontal collusion, the elimination of a large, aggressive buyer, and raising the cost of rivals

67 These include, firstly, the relative ease of identifying and controlling mergers as opposed to internal expansion; secondly, the fact that even if a vertical merger is prohibited it remains open to the firm to achieve the same benefits through internal expansion; thirdly, internal expansion introduces new capacity and competition. This is likely to generate greater efficiencies because this new capacity will have to win its way in the market. Fourthly, a vertical merger, as opposed to internal vertical integration, is less likely to generate immediate economies in production because the plants are unlikely to be combined. (Areeda, Hovenkamp and Solow – Antitrust Law, Vol. IVA p.141)

relatively small market shares. But this does not take us very far – clearly the evaluation requires a detailed examination of the facts of the case in question and it is to this that we now turn.

The Relevant Markets

14. SCHS and PD are in a vertical supplier/customer relationship and the two relevant markets with which we are concerned in this merger are the supply of medium wax to the candle industry in South Africa (the 'upstream market'), and the production and marketing of household candles in South Africa (the 'downstream market'). Both SCHS and PD sell their products throughout the Republic. Note that both the Commission and the merging parties agree that the relevant product markets affected by this transaction are the market for candle wax and the market for household candles. They also agree that the relevant geographical market is South Africa.

The upstream market

15. SCHS produces and markets *hard waxes*, that are used in the hot melt adhesive, polymer processing and printing inks industries; *medium waxes*, that are mainly used in the candle manufacturing industry; and *paraffins*, that are used in the oil exploration, synthetic rubber and solvents industries.

16. Waxes may be divided into different groups based upon the oil content of their respective products with the lowest, fully refined paraffin wax, having an oil content of 0,5% and the highest, slack wax, with an oil content of 5-20%. The higher the oil content, the softer the wax and the less suitable for producing candles.

17. Of the different waxes that can be distinguished in the industry, that is, fully refined paraffin wax, semi-refined wax, SCHS medium wax and slack wax, only a wax blended from a combination of slack wax and a better quality semi-refined wax, could be regarded as reasonably substitutable for the medium wax produced by SCHS, in order to produce candles. The medium wax produced by SCHS, which is used for candle manufacturing, is allegedly of a lower quality than the imported semi-refined wax. When the higher quality imported wax is used for candle manufacturing it is first blended with lower quality slack wax.[68]

18. The medium wax manufactured by SCHS is manufactured at Sasolburg, using raw material purchased from Sasol Ltd in Boksburg and slack wax from Shell, BP and overseas suppliers. This is a continuous process and the output, which is immediately suitable for use in the manufacture of household candles, must be removed from the factory because candle wax cannot be stored

68 Although there is a price differential of approximately 11-15% between imported semi refined wax and medium wax, it was confirmed at the hearing that the former is of a higher quality than the latter and that, before use in candle production, the imported wax was 'extended' by blending it with slack wax, which is cheaper – thus the effective price of the imported wax that goes into local production (that is, after it has been blended with the less costly local slack wax) is not significantly above medium wax. Unless the costs of production of local medium wax, on the one hand, and the blended imported wax, on the other hand, are identical this would indicate that SCHS is pricing at import parity, a pricing strategy available only to monopolists (or, what is the same thing, colluding oligopolists).

economically. If the wax cannot be sold to candle manufacturers, it must be "cracked" into fuel and sold at a lower realisable value.[69]

19. The estimated market shares of participants in the medium wax supply industry are SCHS 75%, Masterrank 8%, G Zabel 6%, Reach Industrial 6%, BP 5% and Shell 2%. Although some submissions claimed that SCHS's current share of the domestic market for household candle wax was considerably in excess of 75%, it is common cause that its share is no less than 75%.

20. Note that most of the competitors mentioned above – all, with the exception of BP and Shell – do not produce wax.[70] They import it and distribute it and account for approximately 20% of the local market. Imported, unprocessed medium wax is not subject to import duties. It appears that, for the most part, the share of imported wax used in the domestic candle market is a residual of that available from SCHS, that is, when SCHS does not have supplies of wax available candle manufacturers resort to the higher priced imported wax which they then 'extend' by blending with cheaper (because inferior) South African produced slack wax. Manufacturers of decorative candles – not part of the relevant market - use imported wax, the South African product not being suitable for this segment of the candle market.

The downstream market

21. PD produces and markets household candles, which consist of a pack of six white candles each weighing 75g or 450g in total. This candle market must be distinguished from decorative candles. . Candles may not be sold as household candles unless they comply with the specifications laid down in SABS Standard No. CKS60.

22. Although possible substitutes for candle-use include oil lamps (paraffin) and electricity the fact of the matter is that, at present, a large portion of the South African population, especially the very poor, still rely on candles for primary lighting purposes.

23. The estimated market shares of the five largest participants in the market for the manufacture and distribution of household candles are PD with 42%, Willowton and Cake Mills 13%, Morlite Industries (Buffalo) 11%, Boardman Brothers, t/a Newdons[71] 9% and Sealake Industries 7%. SCHS currently is the only supplier of wax to PD, Willowton and Cake Mills and Morlite Industries, which covers 66% of the household candle market.

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69 It appears that this feature of the product dictates SCHS's preference for long term supply contracts with its principal customers in the downstream market. It has enjoyed such an arrangement with PD since 1995, the year in which SCHS sold PD to the Goodman family trust. It has a supply agreement in place with Willowton, the second largest candle producer – with a 13% market share – in South Africa. Note however, that contrary to the impression sometimes created, there is an alternate use for the wax – it may be 'cracked' into fuel– but it is a less commercially attractive use.

70 BP and Shell actually sell some of their slack waxes to SCHS as well as to the importers of wax for blending purposes.

71 However it alleges that it does not compete with PD because it is operates in a niche market -it uses higher quality imported wax, the candles have a smoother appearance and the packaging differs slightly.

24. South African manufacturers – both decorative and household candles - are protected from imports by a standard duty of 20% on imported candles. According to the parties imported candles, both decorative and household, account for only 8% of the candles distributed in South Africa.

25. The parties estimate that candle manufacturers are operating at 60% of their capacity.

The Act

26. The Act requires us to consider mergers in terms of section 12A, which states in subsection 12A(1):

'Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –

a) If it appears that the merger is likely to substantially prevent or lessen competition, then determine -

i. Whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

ii. Whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

b) Otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).'

27. Section 12A(2) reads:

'When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including –

a) the actual and potential level of import competition in the market;
b) the ease of entry into the market, including tariff and regulatory barriers;
c) the level and trends of concentration, and history of collusion, in the market;
d) the degree of countervailing power in the market;
e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
f) the nature and extent of vertical integration in the market;
g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
h) whether the merger will result in the removal of an effective competitor.'

The Impact of the Transaction on Competition in the Relevant Markets

28. By any measure of concentration both SCHS and PD enjoy powerful positions in their respective markets. The Herfindahl-Hirschman index (HHI) that measures concentration and which guides anti-trust investigation and adjudication indicates significant market power in each of the markets in question with an HHI in the upstream market of 5786 points and in the downstream market at 2222 points.[72]

29. Furthermore, in the upstream market the single-firm concentration ratio (the C1 ratio) is exceptionally high at 75%. In the downstream market, the C1 ratio is also notably high at 42% and the C3 ratio (the three firm concentration ratio) is 66%.

30. Antitrust scholars Areeda, Hovenkamp and Solow observe that in the USA vertical mergers are unlikely to be challenged unless the HHI in the upstream market exceeds 1800, and a large percentage of the upstream product would be sold through vertically integrated retail outlets after the merger.[73] In this case SCHS, in 2000-2001, sold approximately [*this evidence is claimed confidential*] of its domestic wax supply to PD with whom it has a supply agreement.[74]

31. However, as with all vertical transactions, these measures of concentration and indicators of market power do not increase in consequence of the transaction and, hence, by these measures alone, competition cannot be said to have lessened.[75] The question that must rather be asked is whether the transaction allows the parties or one of the parties to prevent competition in the relevant market(s) thus maintaining or extending the anti-competitive structure of both or one of the markets[76].

32. As we shall elaborate, we find that the transaction prevents or lessens competition in the candle wax market, the upstream market, by raising barriers to entry in respect of that market. Furthermore, the transaction significantly increases the capacity of the merged entity to consolidate and extend PD's already powerful position in the downstream market. We will show that

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72 According to the U.S. Department of Justice and the Federal Trade Commission Horizontal Merger Guidelines HHI values below 1000 involve no significant monopoly power, whereas those above 1800 clearly do.

73 Areeda, Hovenkamp and Solow: Antitrust Law, Volume IVA p.168

74 It also sold, in the same year, approximately [*confidential information*] of its product to Willowton, its second largest customer, with whom it has a supply agreement.

75 See footnote 13 above.

76 Areeda, Hovenkamp and Solow, Antitrust Law Vol. IVA, p.137: "A vertical merger, standing alone, does not alter concentration … Accordingly, any anticompetitive effects of a vertical merger must arise from other structural or behavioral consequences such as increased entry barriers, the elimination of non-integrated rivals by foreclosure, or the raising of rivals' costs".

dominating the downstream market allows SCHS to protect its monopoly position in the upstream market for candle wax.

The Impact on Competition in the Candle Wax (upstream) Market

33. SCHS are major international producers of candle wax. The company clearly dominates the local market in the product. SCHS insists that its overwhelming interest is in the production of wax. It does not, it says, have a primary interest in the production of candles or in the price of candles except insofar as these impact on its ability to sell wax. In fact in 1995 it exited the local candle market when it sold Price's Candles to the Goodman family precisely, it avers, to avoid the conflict with its other candle manufacturer customers that was generated by SCHS's presence in both upstream and downstream markets.

34. SCHS's normal commercial interest in ensuring that its wax enjoys widespread support in the market is intensified by the nature of the product. Firstly, as already noted, wax cannot be economically stored. Secondly, it is a by-product of a larger chemical production process thus constraining, it appears, SCHS's ability to adjust, in the face of changes in demand, the supply of wax that it brings to market.[77] This has, it appears, dictated a particularly close relationship between supplier and customer manifest in, inter alia, exclusive supply relationships with its major customers, notably, in South Africa, with PD.

35. The security and stability of SCHS's relationship with its market has been disturbed by a conflictual relationship with PD, its major customer. A supply agreement between the parties has been in force since the sale of Price's to the Goodman family trust in 1995. The agreement essentially provides that PD shall procure the lion's share of its wax input from SCHS. It is permitted to source a small amount of wax from suppliers other than SCHS.

36. It appears, however, that relations between the parties have been fraught with conflict. The upshot is that PD has run up a significant trading debt with SCHS. SCHS has secured its debt by concluding a pledge agreement with the Leo Goodman Family Trust.[78] Moreover, it appears that there has been significant conflict between the parties regarding the terms of the contract and the performance of the contract. These conflicts had been referred to arbitration. The Tribunal has not been provided with details of this conflict. Suffice to say that immediately prior to arbitration SCHS offered, in exchange for settlement of all disputes between the parties and outstanding debt, to acquire PD from the Goodman Family Trust.

37. This, as outlined above, is the origin of the transaction before us, one that has been presented by the parties as the inevitable outcome of a commercial relationship gone sour and of a company,

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77 Dr. Barth, the Chairman of SCHS, put it thus to the panel: "…I'm not so much interested as Schumann Sasol what happens to the candle price. I'm interested to my supply in wax and as we have stated earlier it's a continuous process and if we would say we reduce the manufacturing of wax for whichever period by even only 20% or 30% then that would have an immediate effect on the whole production of our Sasolburg plant because it's a continuous process and it's a process with complementary products, you either produce or you do not produce. You cannot produce only one product and not produce the others." (Transcript of hearing, 28 June 2001 pp.48-9)

78 The Leo Goodman Family Trust pledged its shareholding in PD to SCHS as security for amounts owing under the wax supply agreement.

SCHS, attempting to settle a conflict with its contracting partner and to exercise its security rights. From the perspective of a major creditor, this presentation of the transaction is perfectly plausible. However, from a competition perspective, it must be given a somewhat different cast, one supported by other concerns articulated by the parties.[79]

38. From a competition perspective the transaction is to be viewed as the action of a producer intent upon defending or extending its market share. This motivation is unimpeachable at competition law. Indeed it is, or may be, the very stuff of competition *as long as the mechanism for achieving that objective is the provision of a superior or lower-priced product.* Our task is to ensure that this otherwise laudable objective is not realized through an anti-competitive mechanism.

39. Consider, again, the background: the dominant player in a market is faced with, what appears to be endemic conflict with its major customer. At stake is the potential loss of that customer – it may seek an alternate supplier or it may exit the market altogether. The normal commercial concern that would inevitably accompany that threat is exacerbated by the nature of the product, by, in other words, the imperative to maintain the level of output and to ensure that the output is consumed as soon as it is produced.

40. This situation is ripe for competitive entry into the candle wax market. And there are potential competitors on the horizon. There are no tariff barriers and international competition, particularly in the form of Chinese imports, already has a toehold in this market. Moreover, it appears that Shell, a potential alternate supplier of a competing wax product, has recently resolved some significant technical problems at its Malaysian refinery and is eyeing the local market. This is, quite understandably, a situation in which any producer would feel acutely vulnerable, all the more so one with the technical constraints faced by SCHS.

41. In the event that PD survives, there exists the real possibility that it may change its allegiance to another supplier, the more so if the arbitration allows it to escape its obligations under the supply agreement. If, on the other hand, PD fails then a large portion of the candle market is unaccounted for. It may be taken up by imports, by new entrants or by producers currently active in the market, producers who have not entered into supply agreements with SCHS. Both of these scenarios are immensely threatening to SCHS's interests, a threat significantly exacerbated by the nature of the product. As Dr. Barth, the Chairman of SCHS, eloquently expressed it at the Tribunal hearing: "Please imagine just for a moment that the candle industry would decide for 2 months period to buy Chinese wax instead of Schumann Sasol wax."

42. From a competition perspective it is this consideration that has driven SCHS's decision to acquire its largest customer. When PD's custom is secured, it, together with the supply agreement with Willowton, secures for SCHS the lion's share of the South African wax market. There are other mechanisms for achieving SCHS's objective, but they carry a greater risk of failure. The pro-competitive mechanism preferred by competition law is through the provision of a better or less

79 The parties have effectively suggested that the financial ties between the parties – dominated by PD's debt to SCHS – necessitate subjecting this transaction to a lower competition standard than that accorded another transaction. This plea has no merit. We must naturally base our decision on the competition perspective, on the impact of the transaction upon competition. The transaction may make perfect sense from a private commercial perspective but we must still confine ourselves to the competition perspective and to the other factors – efficiency gains and public interest - specified in the Competition Act. Expressed otherwise the Competition Act does not permit us to suspend or dilute our standards of evaluation because one of the parties to a proposed transaction seeks relief, through merger, from the consequences of an imprudent or unfortunate business decision.

expensive product. Supply agreements along the lines of that between SCHS and PD is another option. However, as Mr. Barth expressed it "the experience which we made with the selling the business in '95 to the Goodman family, would not be an argument in favour of trying to do that again."[80]

43. From SCHS's perspective then the immediate virtue of the acquisition – its narrower financial considerations aside – is that it secures a share of the candle wax market that is not subject, as in the PD situation, to the vagaries of a disputed contract and to the possibility of hold-up by its largest customer. However, from a broader competition perspective it ensures that SCHS's competitors are reduced to the role of bit players participating at the fringes of the market. They are excluded from the largest part of the market in an area of production subject to scale economies and in which the respective participants – the supplier and customer – place a high premium on certainty of supply and demand. Their only way of entering the upstream candle wax market would be to enter, simultaneously, the downstream candle market. But this is unlikely to happen. Like SCHS, they are not candle manufacturers and, in a market where there is already one dominant candle producer, one owned, moreover, by the dominant competitor in the candle wax market, this approach is fraught with risk. Under the circumstances the competitors are likely to accept their bit player status.

44. Confined to the fringes of a monopolized market, the presence of competitors does not represent a threat to SCHS. Quite the contrary, they perform a useful function, and this is precisely why the supply agreements permit the candle manufacturers to purchase a small share of their candle wax from alternative suppliers. As already noted at length, SCHS's technical constraints do not permit it to fine tune its production levels, to adjust output to short run spikes and troughs in demand. In this circumstance the presence of fringe suppliers is useful – they can be competed with in demand troughs for the fringe of the market; and they can help order the market when demand spikes thus allowing SCHS to avoid having to introduce additional capacity that may not find available demand in down periods. In response to Shell's re-entry at the fringes of the market Dr. Barth noted that its presence "will then also balance the supply and demand situation so that situations as we had in the past (where) we are not able to meet additional demands for product will then not be repeated." The entry of a competitor, even a potentially formidable competitor, is welcomed in the firm knowledge that SCHS's acquisition of the largest candle manufacturer ensures that its competitor remains confined to the fringes.[81]

45. We must, in concluding our finding on entry barriers in the candle wax market, respond to one other argument advanced by the parties. It is argued that SCHS already has its dominant position secured by the supply agreements with PD and Willowton. Hence, the argument continues, the acquisition does not disturb the *status quo*; it does not raise already high entry barriers. We are not persuaded by this argument. A contractual agreement is not immutable. The very proof of that - if any is needed – is provided by the relationship between PD and SCHS. Moreover, even well

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80 There are also indications in the SCHS submission to its supervisory board that it feared that the supply agreements would not pass muster with the competition authorities.

81 Note that participants who are compelled to operate in this manner at the fringes of the market are compelled to absorb most of the risk of market fluctuation. As Areeda et. al observe "A risk is a kind of cost, and a firm that faces higher risk must customarily pay more for capital, and must charge higher prices during strong demand periods to make up for increased losses during weak periods of shortage. To that end, the ability to shift the risk to rivals effectively raises their costs" (Areeda et al p. 181). Note too the evidence of considerable 'churning' (that is rapid entry and exit) of firms at the fringes of the market. This of course increases the risk assumed by wax producers reliant upon this end of their market for their custom.

functioning contractual relationships provide for termination and are subject to re-negotiation and this at least allows a potential entrant to contemplate a substantial presence in this market. As important, it forces the incumbent to contemplate a competitor entering the market. This potential is precluded by the acquisition. Accordingly, the acquisition lessens the potential for competition; it indeed prevents competition, by raising entry barriers above those present as a result of the supply agreement.

46. The Commission has proposed that this transaction be approved subject to the imposition of certain conditions. None of the conditions proposed will overcome the heightened entry barriers in the market for candle wax. In fact, the Commission confined its considerations and concerns to the candle market and it does not appear to have considered the transaction's impact on the candle wax market despite having identified this as one of the markets affected by the transaction. We have not been able to devise conditions designed to cure the effect of the transaction on entry barriers in the candle wax market.

The Impact on Competition in the Household Candle (downstream) Market

47. The Commission expressed the view that the proposed deal would diminish competition in the household candles market should the transaction be approved unconditionally. An unconditional approval, in the Commission's opinion, would lessen the number of participants in the candle production and distribution market in future in what is already a concentrated industry. Future competition, i.e. new entry, could be adversely affected if not totally eliminated. In addition, the Commission provide evidence establishing that, in the past, many new entrants found it impossible to survive in the market place. In the Commission's view the proposed transaction would not only make new entry highly unlikely, but the potential restriction on competition and anti-competitive practices that could flow from this transaction could also force existing participants, mostly small to medium-sized firms, from the candle production and distribution market.

48. As already indicated, SCHS insists that its overriding interest is in the candle wax market. It denies that it has primary designs on establishing a dominant position in candle manufacturing. Far from that being the case, it insists that it is cognizant that its interests as a manufacturer of candle wax (the upstream market) are in potential conflict with a presence in the downstream candle market and that this will temper any prospect of anti-competitive behaviour on its part in that latter market. In support of this contention it points to its withdrawal from candle manufacturing in 1995 and insists that its re-entry into the business of manufacturing candles was forced upon it by its fraught relationship, concretely including its financial relationship, with PD and the likelihood of that company's imminent demise.

49. We will however demonstrate that, from the perspective of the interests of SCHS, the wax producer, there is, nevertheless, considerable incentive for the merged entity to extend its powerful position in the downstream market, the candle market. And we will then show that this transaction provides the wherewithal for an anti-competitive response to that incentive. In other words, we have demonstrated above that, despite its powerful position in the candle wax market, SCHS has strong grounds for feeling vulnerable to potential entry into this market. The acquisition by SCHS of PD, its largest customer, is, we have found, a mechanism for shoring up its dominance of the upstream market by raising barriers to entry in that market. By the same token, SCHS's imperative to defend its dominance in the upstream market provides the incentive for anti-competitive behaviour in the downstream market and the transaction provides the means for

pursuing that conduct.[82] We emphasize that SCHS is not hereby discouraged from defending its market share in candle wax provided it achieves this through the pro-competitive mechanism of a superior product. We are simply enjoining a mechanism – the merger – that will permit the realization of this objective through anti-competitive practices in either of the affected markets.

50. SCHS has consistently maintained that it has no interest in favouring its prospective subsidiary, PD, over its other customers. It points out that although PD consumes approximately [*confidential information*] of SCHS's medium wax supply, it must still, particularly given SCHS technical constraints, ensure the loyalty of the remainder of its customer base. This imperative, it avers, predisposes it against anti-competitive practices directed at PD's competitors who remain important customers of SCHS.

51. The Commission has sought to bolster this assurance by recommending the imposition of the following conditions on the transaction, designed to prevent SCHS from discriminating in favour of PD relative to that of its competitors in the candle market:

    (i) *The primary acquiring firm is reminded that at all times it shall comply with the provisions of Section 8 and Section 9 of the Competition Second Amendment Act;*
    (ii) *SCHS must at all times adhere to the principles of transparency and non-preference in supplying candle manufacturers with wax;*
    (iii) *SCHS will not refuse to sell wax directly to any potential purchasers. However, if a single transaction is in respect of less than 100kg, SCHS may refer such potential purchaser to a retailer of wax;*
    (iv) *In the event of production shortages, the available wax would be proportionally supplied to all customers. SCHS must apply generally accepted trade standards (i.e. an equitable method of supply) that would not give preference to Daelite in these periods of shortages;*
    (v) *SCHS shall not give any confidential rebates or other advantages to Daelite;*
    (vi) *SCHS may only apply price differentiation and other differential treatment as provided for in Section 9 of the Competition Second Amendment Act, and then only if such differential treatment is economically justifiable.*

52. We are, however, not persuaded by this recommendation. In our estimation, should SCHS believe that its share of the candle wax market, the upstream market, is threatened by a possible tie-up between an alternative supplier of wax and one of the smaller producers of candles, its dominance of the upstream market combined with its powerful position in the downstream candle market will enable it to consolidate its position in the latter market precisely in order to maintain the already significant barriers in the upstream market that have, as we have demonstrated above, been consolidated and extended by this transaction.

53. Note that this does not necessarily presuppose that the upstream firm engages in unlawful restrictive practices of the sort contemplated by the Commission's proposed conditions. PD in the downstream market is accorded a massive anti-competitive advantage by the mere fact that SCHS, its parent in the upstream market, has intimate, direct and immediate knowledge of the production capacities and output levels of all PD's competitors in the downstream market, including knowledge of fluctuations in their demand for wax (which, in turn, is directly derived from the

82 Although at opposite ends of the technology spectrum, this is remarkably similar to the conclusion of the US Appeals Court in its much quoted recent decision in the Microsoft case: "Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows." - U.S. v. Microsoft Corp. decided on 28 June 2001.

demand for their candles). In other words, SCHS may behave quite lawfully in relation to its customers – it may refrain from discrimination, from withdrawals of supply, or from foreclosure. However, its vantage point as the dominant supplier of the critical input in candle manufacturing accords it privileged insight into the capacities and strategies of its downstream subsidiary's competitors. The conditions proposed by the Commission do not restrain this and nor do we believe that it is possible to achieve this through the creation of artificial 'fire walls'.[83]

54. Moreover, while the conditions may limit the ability of SCHS to engage in discriminatory practices that favour PD they clearly do not limit PD's ability to engage in other anti-competitive practices. One example is predation. A number of submissions suggest that PD has already engaged in this practice. A counter-argument, and one that is borne out by the allegation that predation has already occurred, is that the transaction does not enhance PD's ability to predate – its ability to predate was given by its pre-merger market power and this has not increased in consequence of the merger. However, there is little question that the ability to predate is substantially enhanced by the deep pockets of a powerful shareholder, particularly one that may be willing to take significant losses downstream in order to defend its dominance in an important upstream market.[84]

55. Our concerns in this regard are confirmed by submissions that indicate that enhanced domination of the candle industry is already part of SCHS's game plan. In a submission made by Morelite, PD's largest competitor in Gauteng, it was averred that in a meeting held in September 2000 between representatives of SCHS and Morelite, the former outlined his company's intention to acquire PD and then to transform the other candle manufacturers into distributors of PD manufactured output. This claim was denied by SCHS at the hearing. Moreover, on the morning of the hearing Morelite informed us that it had reached an accommodation with SCHS – the precise nature of which was not placed before us – and that it accordingly withdrew its objection to the transaction. However, the submission to SCHS' Board of Directors confirms the Morelite account.[85] We should add that this interpretation was not denied by SCHS (although the meeting

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83 The US Federal Trade Commission recently considered a vertical transaction between the Ingram Book Group and Barnes & Noble, respectively the largest wholesaler and retailer of books in the United States. The transaction appears to have been withdrawn at the 11th hour while the FTC was considering behavioural remedies broadly similar to those proposed by the Commission in this matter. Richard Parker and David Balto, two FTC officials, comment as follows: 'The only remedy that might have addressed the situation is a set of behavioral rules—essentially a set of non-discrimination or 'fair dealing' provisions. But those kinds of rules can be problematic. They are susceptible to evasion and difficult to monitor, particularly in a transactional setting where discrimination could be exercised in subtle ways on several different variables. While the (Federal Trade) Commission has on occasion accepted some form of behavioral relief in mergers, those approaches may not have worked in this context. Recall the Supreme Court's admonition in *DuPont* (United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961) that "the public interest should not in this case be required to depend upon the often cumbersome and time-consuming injunctive remedy" to enforce behavioral rules "- *The Evolving Approach to Merger Remedies by Richard G. Parker & David A. Balto, published in Antitrust Report (May 2000).*.

84 The parties have insisted that they have not been found guilty of restrictive practices in the past and that we cannot make our decision on the basis of an inference of future conduct. We cannot, it is insisted, engage in speculation about the future; we must rather concern ourselves with evidence from the present. We do not understand this argument. Merger regulation is, in significant part, inherently speculative - it is pre-emptive insofar as it designed to ensure that the merger proposed does not give rise to a market structure that lends itself to restrictive practices. It is our view that the market structure that will emerge from this transaction does lend itself to a number of restrictive practices, including predation, not all of which can be forestalled by the imposition of conditions.

85 This evidence is borne out by a confidential statement.

with Morelite was denied). It sought rather to downplay the significance of this (confidential) statement by suggesting that it simply reflected discussions regarding the long-term future of the candle industry.

56. It was also pointed out that entry barriers into candle manufacturing are relatively low. We accept this – it is borne out by evidence of new entry. . We note however the extremely high rate of attrition or exit. It appears then that while entry requires relatively little technological sophistication or capital, it is nevertheless difficult to sustain. This is not surprising. Simply put it is difficult to sustain a presence in a market in which the largest participant has a 42% market share and the three largest share 66% of the market. The fact that the largest player is owned by the dominant supplier of the key input renders this market particularly inhospitable. It suggests that, at best, new entrants into the candle market will, as with new entrants into the candle wax market, have to content themselves with the fringes of their market thus posing no competitive threat to the dominant players.

57. In sum then, we conclude that the transaction before us enables SCHS to maintain and extend its dominant position in the market for candle wax. Furthermore, should SCHS deem it necessary to further secure its position in the upstream market by extending its powerful position in the downstream market then this too is facilitated by the transaction. Accordingly we find that the transaction will substantially lessen or prevent competition in both markets in question.

A failing firm

58. Section 12A(2)(g) of the Act enjoins us to consider "whether the business of part of the business of a party to the merger or proposed merger has failed or is likely to fail." The parties have raised the failing firm defense.[86] In effect, they argue, as they are entitled to do, that the prospective failure of PD, the target firm, justifies the application of a lower anti-trust standard to this transaction. The merger, they claim, is necessary to ensure PD's continued presence in the market. Absent the merger, PD will fail. In that event, a significant competitor will have been removed from the market - competition will have been diminished in consequence of the failure of this competitor, more particularly if the productive capacity represented by PD's material assets exits the market altogether. Under these circumstances – that is, if the firm (and, more so, its assets) exits the market - competition will actually have diminished thus exerting upward pressure on candle prices.

59. We should, at the outset, indicate a plausible alternative scenario in the event of PD's demise. There is, it is common cause, considerable excess capacity – 40% is the figure given – in this industry. Moreover it is common cause that that there is relative ease of entry into candle manufacturing, the downstream market. It is, in our view, eminently plausible that, upon PD's

86 Anti-trust jurisdictions differ in the way in which they treat the failing firm defence. The concept originated in the United States where it provides an absolute defense to a finding that a merger will substantially lessen competition. It was first recognized in International Shoe Co. v. FTC, 280 U.S. 291 (1930). Because it provides an absolute defence its requirements are rigorous and difficult to meet. Also see the 1992 US Merger Guidelines. The EU in Kali-Salz/MdK/Treuhand, Case IV/M308 [1994] 0.J. L186 has broadly followed United States v. General Dynamics Corp., 415 U.S. 486 (1974) in dealing with the failing firm defence. With regard to Canadian merger law Paul S. Crampton in his book *Mergers and the Competition Act*, 1990 in footnote 59a on p.408 quotes the Competition Authority in the Wadair/PWA merger indicating that "In assessing the failing firm factor in mergers that are otherwise considered to be substantially anti-competitive, the Director requires information relating to two issues: 1) the extent to which failure is, in fact likely to occur; and 2) whether there are alternatives to the merger that would be less restrictive of competition."

exit, its existing competitors will, through utilizing their spare capacity, increase their output and compete for a share of PD's erstwhile market. Equally, new firms may enter the market, possibly availing themselves of those of PD's material assets that come onto the market. Indeed SCHS itself has insisted that it will enter the market should PD fail.[87] On this scenario competition will actually intensify in the wake of PD's failure. Moreover, the relative resilience of PD's competitors will have been rewarded by the market share that they will gain as a result of the very process of competition.

60. However, the 'failing firm' is a term of art in merger regulation and it is incumbent upon us to examine the criteria commonly used in assessing the salience of the failing firm defence in this case. We do however insist that, as in most anti-trust assessments, the facts of the specific case will take precedence over the application of a derived formula. In our view the existence of considerable excess capacity is a salient fact that militates against the prospect of a shortfall in supply, and therefore upward pressure on price, in the wake of failure.[88] We nevertheless will reflect on the range of tests and criteria conventionally employed to assess the impact of potential firm failure on the competition implications of a merger.

61. First, is PD failing? According to the parties: " PD is demonstrably insolvent". [89]

62. There is little doubt that PD's financial predicament is dire. We should note that we do not understand, nor have the parties or the commission shed any light upon, how a firm with significant market share in a mature industry has landed in this sorry situation. It has not, after all, been derailed by a new innovation to which it has not had access. The Commission claims that the firm's auditors believe that the firm sold by SCHS to the Goodman family in 1995 was already in trouble. Others suggest that PD has been pricing below cost, presumably cushioned by a steady supply of loan capital from SCHS. The Goodman's allege that PD has been prejudiced by SCHS failure to adhere to the terms of the supply agreement. SCHS implies that management failure accounts for the firm's predicament.

63. None of these various allegations and explanations has been satisfactorily supported by evidence. However, an understanding of the causes of PD's failure is pertinent for two reasons: In the first place, it is not clear how SCHS intends post merger to address the cause of PD's possible failure and, as we shall demonstrate below, this has bearing on the merger evaluation, particularly on the question of countervailing efficiency gains resulting from the transaction as well as its impact on public interest. Moreover, failure, if it is to occur, will happen at the behest of SCHS, immeasurably the largest creditor. It appears that PD's failure could have been triggered by SCHS at any time over the last several years.

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87 SCHS suggests that the fact that it will enter the market should PD fail is further evidence that prohibiting the transaction will make no difference to the competitive structure of the market. Regardless of whether the transaction is approved or prohibited, we will have a vertically integrated firm participating in the market. We do not accept this argument. SCHS is, of course, perfectly entitled to vertically integrate through internal growth because in order to do so it will have to compete for its share of the downstream market in much the same way as a firm is entitled to expand horizontally, even to monopoly, as long as it achieves this by competing. Merger regulation is meant to prevent the attainment of an anti-competitive position through means other than competition.

88 The parties have acknowledged this argument but insist that this will only take place with a considerable time lag – eighteen months was suggested. During the intervening period there will be a shortfall in demand. However with a large proportion of unutilised capacity already in place and relative ease of entry, we cannot understand why there should be such a slow response in a situation of excess demand.

89 This is substantiated by evidence, which is claimed confidential.

64. Unless we understand why the firm has been unable to survive profitably, it is difficult to understand why SCHS should trigger liquidation now rather than 12 months ago or, indeed, rather than 12 months hence. One possible inference is that SCHS has chosen to subsidise a captive, though inefficient, customer in preference to instability (read, competition) in the market for its candle wax. If this is so then SCHS has reaped the consequences that protection so often begets: increasing inefficiency matched by increasing subsidy. It should not expect the competition authorities to rescue it by sanctioning the ultimate protective umbrella, namely full vertical integration, regardless of the impact on competition. In short, while we believe that PD is in dire straits, we are not certain whether its failure is necessarily imminent – that will depend upon SCHS's continued interest in protecting the company.

65. Secondly, has there been any attempt to find an alternative suitor for PD, one that raises fewer competition concerns than SCHS? SCHS makes the plausible argument that few buyers would be willing to assume PD's massive debt. However it appears that there has been a concerted attempt to find a buyer for PD. Note that this search has specifically excluded other South African candle manufacturers. SCHS avers that they have been excluded in part because it was calculated that a horizontal transaction would not have received competition approval. SCHS has also made it emphatically clear that it would not welcome a situation where it was beholden to a single large customer. The absence or presence of willing buyers is, for the most part, a function of price – this is after all not a new untested product; its market and mode of distribution is well known and relatively predictable. The price of PD is largely a derivative of the extent to which SCHS is willing to assume the target company's debt. SCHS is proposing to purchase PD for a nominal sum because it has effectively been willing to write off its massive debt in exchange for vertical integration. Should it be willing to do the same in respect of other purchasers then alternative offers may come to the fore.

66. Thirdly, is there any prospect of re-organising PD? That is, is there any prospect of PD surviving without the merger? As we shall elaborate when we discuss the prospect of countervailing efficiency gains, little has been said about the prospects of raising PD's performance. We are accordingly unable to answer this question. SCHS, though revealing few details, believes that it is capable of turning around PD. It is not clear why it cannot achieve this without first merging. SCHS has argued that it has been in effective control of PD since 1998 – if it is possible to restore PD's fortunes through the adoption of pro-competitive strategies then surely SCHS should be able to achieve this from its present position without resorting to the expedient of an anti-competitive merger.

67. Fourthly, what will happen to PD's market share? The Commission errs by asking where PD's market share will go post-merger. Clearly, it will go to the acquiring firm, SCHS, or, technically, it will remain with PD now controlled by SCHS. However, what is pertinent is what will happen to its market share post-failure? If it can be shown that the acquiring firm (SCHS) will simply mop up the target firms (PD's) market share post-failure then there is, it is argued, little point in prohibiting the merger because the impact on market shares in the downstream market will be identical – either way, the acquiring firm will take the target's market share. However as we have demonstrated above the post-failure outcome is by no means clear because there will be several competitors contending for PD's market share including existing participants in the candle market and possibly new entrants, including SCHS itself.

68. Finally, what will become of PD's assets post failure? We have already suggested that the pertinence of this question is eroded by the existence of significant over-capacity. On the evidence the most likely outcome is that certain of the assets, to the extent that they are divisible, will be

acquired by new entrants, while others may find their way out of the country. However, in the context of considerable excess capacity we do not believe that the market will be characterized by a significant supply shortfall post-failure.

69. In summary, we find that the failing firm defence does not support approval of this transaction. First, it is not clear that the firm will actually fail despite its parlous circumstances. Secondly, the extent of excess capacity in the industry and ease of entry suggests that the competitive situation will not deteriorate in consequence of the exit of PD (or its assets) – quite the contrary, we are likely to see an intensification in competition. Third, if SCHS has a pro-competitive strategy for reviving PD's fortunes it is not clear why this cannot be pursued through means other than the merger. Finally, while we are persuaded that SCHS and PD have sought alternative purchasers, the success of their search will, in a relatively stable industry, depend on price and that, in turn, will depend on the quantum of PD's debt that SCHS is willing to assume – it is the only purchaser because it has only been willing to write off its own debt in exchange for complete vertical integration. [90]

Pro-competitive Efficiency Gains

70. Are the anti-competitive consequences of the transaction countervailed by pro-competitive efficiency gains?

71. The Commission points out that SCHS has not specified efficiency gains arising from the transaction aside, that is, from a blanket assertion that these are assured by the injection of SCHS's superior management and financial resources. We have already pointed out that SCHS's financial resources have long been at PD's disposal and these have not apparently improved the latter's competitive position. We have also noted that SCHS's financial resources may plausibly give rise to anti-competitive predation rather than a pro-competitive resolution of PD's predicament.

72. SCHS has, in fact, only proposed one concrete strategy for alleviating PD's plight.[91] Note that there is no certainty that PD's competitors will respond to this strategy by taking market share from PD. Certain of PD's competitors have already intimated that PD has been pricing its output below cost. Under these circumstances a more plausible scenario is that they will accept price leadership from PD – in that event PD's competitors will similarly seek to enhance their profitability by hiking their own prices in a market in which the price elasticity for the product is, given the absence of ready substitutes, likely to be low.[92] Given a C1 ratio of 42% and a C3 ratio of 66% price leadership would be extremely likely.

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90 Expressed conversely, through writing off its debt (that is, through assuming PD's debt) SCHS has effectively demonstrated its willingness to pay a premium price for PD – the inference is that it is willing to pay this price because, through vertical integration, it secures dominance of the markets in question. Other purchasers would not be willing to pay this price – or, assume this level of debt – because they would not be able to reap the anti-competitive benefits of vertical integration. However, at a more realistic price, one that reflected simply the cost of acquiring a significant candle manufacturer, alternative purchasers may well be available.

91 Evidence to this effect is born out by a statement in the Submission to the Board of Directors of SCHS for settlement with Goodman Family, which is a confidential document.

92 Refer to *The Economics of Industrial Organization*, fourth edition by William Shepherd, p.261 where the author points out that concentration, homogeneity of products, stable industry conditions, and long familiarity among firms favours tacit collusion, of which price leadership is one form. Also see Areeda and Turner, Antirust Law, Vol.V, p.230 where they mention the three grounds on which the largest firm might become a price leader, one being that the largest might be thought the wisest or at least the more knowledgeable about industry prospects and trends.

Public Interest

73. There are three public interest factors that must be assessed in this transaction. These are export competitiveness, small business and employment.

74. SCHS has asserted that it will focus on penetrating export markets. However, we have not been told how this will be achieved and no further weight is given to this bland assertion. It is certainly not clear that a successful export strategy requires the merging of SCHS and PD.

75. We concur with the Commission that small business is, if anything, promoted by prohibition of the merger. Low entry barriers lend themselves to an active SME presence. Indeed this is a rare case where SMEs seem to have succeeded in maintaining and, it appears, extending their market share, while the only large firm in the industry has floundered. As we have outlined PD's travails may constitute a golden opportunity for SMEs already active in the industry to consolidate and advance their own interests. On the other hand, protecting PD by allowing it to integrate with SCHS may well be the route for realizing one of SCHS's stated alternative strategies of converting existing small and medium-sized candle manufacturers into distributors of PD product.

76. Finally, we must consider the impact on employment. SCHS avers that, absent the transaction, PD will fail and 315 workers will lose their employment.[93] As we have pointed out, there is no certainty that PD will fail despite its parlous circumstances. Second, if, in the event of failure, PD's assets are acquired by a new entrant, certain of these jobs may be restored. Thirdly, we are not told how SCHS will re-organise production in order to restore PD's competitive position – this process inevitably entails job loss and we have not been provided with estimates of this. Indeed, one of SCHS's expressed alternative re-organisation strategies is to relocate the PD operation to Sasolburg and this will, in all likelihood mean that the present employees, who are, for the most part, employed through a labour broker, will lose their employment.

77. We accordingly conclude that the impact on public interest does not outweigh the anti-competitive consequences of the transaction. It should be borne in mind that it is the poorest consumers who consume candles – accordingly, the public interest loss would have to be considerable and certain in order to justify us approving an anti-competitive merger.

_____ 18 July 2001

D.H. Lewis Date

Concurring: M. Holden and U. Bhoola

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93 This figure includes 45 full time employees, 1 temporary employee, 3 independent contractors involved in sale and 267 persons employed through labour brokerage.

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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

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CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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OECD Global Forum on Competition

CONTRIBUTION FROM CHINESE TAIPEI

This contribution was submitted by Chinese Taipei as a background material for the firts meeting of the Global Forum on competition to be held on 17 and 18 October 2001.

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I. – COMPETITION LAW AND POLICY IN CHINESE TAIPEI

1. The Fair Trade Law

Taiwan's competition law is primarily contained in the Fair Trade Law. The Law was drafted in the early 1980s, along with the implementation of government development policies for economic liberalisation and internationalisation, in order to facilitate the transformation of Taiwan's economic structure into a competitive market economy.

Since the Fair Trade Law would have a significant impact on business operations, a series of public hearings were organised, to gather public opinion on the draft law. After five years in the drafting process and another five years of deliberation, the Fair Trade Law was enacted on February 4, 1991. Enforcement began a year later to allow the business communities to adjust their practices. Based on the Fair Trade Law, the Fair Trade Commission was established on January 27, 1992 to begin enforcement of the Law. The Law was amended in February 1999 and April 2000.

The Fair Trade Law has multiple objectives. In addition to ensuring fair competition, it intends to maintain trading order, protect consumers' interests, and promote the stability and prosperity of the economy as a whole.

The Fair Trade Law covers a wide range of restrictive business practices, unfair trade practices and multi-level sales. Restrictive business practices include monopolies, mergers, concerted actions, resale price maintenance, and other restrictive actions, such as boycott and discrimination. Unfair trade practices include counterfeiting, untrue or misleading advertisements or presentations, business disparagement, and other deceptive or obviously unfair actions that might affect trading order.

In principle, the Fair Trade Law permits the existence of monopolies, as long as they do not abuse their dominant market power. With respect to merger control, the Fair Trade Law in general also permits mergers of businesses, but mergers involving parties reaching a certain size must apply to the Fair Trade Commission for approval. Concerted actions are prohibited in principle, exceptions may be made, however, for concerted actions deemed by the Fair Trade Commission to benefit the overall national economy and public interest: for instance, concerted actions that unify specification, promote joint research and development, rationalise operations, boost international trade, combat recession, or assist small and medium-sized businesses.

2. Fair Trade Commission

The Fair Trade Commission (hereinafter the "Commission" or the "FTC") is the authority responsible for enforcing the Fair Trade Law and formulating competition policy. The FTC is an independent agency at the ministerial level and has 9 commissioners supported by a staff of two hundred.

To ensure compliance, the Fair Trade Law gives the FTC a power to issue the cease and desist order, to require the respondent to correct its illegal practices, to require divestiture of an enterprise engaging in illegal merger, and to impose administrative fines up to 50 million NT dollars (about US$1,430,000) per offence. The FTC is equipped with investigation power for discovery of illegal practices, with certain semi-judicial power and function. Despite the fact that the court and the prosecutor

also have competence in these matters, the enforcement largely falls upon the FTC. Criminal behaviour would be referred to the public prosecutor's office if the violators fail to comply with the FTC's order. Criminal sanctions may take the form of either imprisonment up to 3 years or criminal fines up to NT$100 million per offence or both.

3. Enforcement of the Fair Trade Law

The Fair Trade Law is still a relatively new law in Taiwan, since it has been enforced for less than ten years. However, the FTC has made great progress in constructing a fair trading regime, upholding and protecting the market competition function, and pushing forward all sorts of international interchange and co-operation. Here are some positive experiences:

1. Building a Fair Trade Regime

Since its birth in 1992, the FTC has gradually built up a fair trade regime through amending the Fair Trade Law, setting guidelines and building a transparent procedure.

(1) Amending the Fair Trade Law

Beginning in 1993, the FTC began to draft the Fair Trade Law amendment. The first amendment was adopted in February 1999. The amendment was far-reaching in scope. In particular, it substantially raises the ceilings on criminal fines and administrative fines from NT$1 million and NT$500,000 to NT$100 million and NT$50 million, respectively, in order to impoverish those seriously violating the law, as most European countries and the United States have done. It also states that provisions of other laws governing competitive activities of enterprises shall take precedence over the Fair Trade Law only insofar as such provisions do not conflict with the Fair Trade Law's legislative purposes. The amendment thus clearly affirms the Fair Trade Law's status as a basic economic law.

(2) Setting Case Handling Guidelines

In keeping with the aims of transparent and standardised law enforcement, the FTC has worked steadily to set down guidelines for handling various kinds of cases, based on the FTC's cumulative work experience and on interpretation of law. The guidelines serve both to guide the FTC's investigating and disposing work, and as a reference for industry and business. The FTC has adopted some 80 guidelines for the implementation of the Fair Trade Law.

In order to ensure proper and fair imposition of the fines, the FTC has developed sentencing guidelines, requiring staff handling individual cases to take into account the motive and purpose of the violation, expected and real extra profits from the violation, the degree of damages to the trading order, violator's scale of business and its market position, violators' previous records of breaching the Law, whether the violator is co-operative with the FTC in its investigation, etc. The sentencing guidelines consist of calculation methods contributing to the speeding up of the decision-making process on the level of fines for individual cases.

Setting up guidelines is crucial to the effective enforcement of the Fair Trade Law. Guidelines not only help to avoid duplication of analysis of the application of the Law, but also help to establish consistent interpretation of the Law so that enterprises will have a more predictable business environment.

2. Processing Cases

(1) Investigating and Disposing Cases

The FTC has initiated or acted upon complaints to actively investigate into violations by enterprises. During the period from 1992 to 2000, the FTC had received 19,778 cases, which consisted of complaints (12,891cases), applications for mergers (4,832 cases), applications for concerted action (100 cases), and applications for explanation (1,955 cases). In 2000, the FTC made 224 sanctioned decisions, of which only 34 cases were restrictive business practice cases, such as illegal monopolies, mergers, and concerted actions. In contrast, 170 cases (over 70% of sanctioned cases) were unfair trade practice cases. It's important to note that there are 77 sanctioned cases (more than one-third of sanctioned cases) against untrue advertisement.

(2) Taking Corrective Program

For violations that might be prevalent in one particular industry, the FTC frequently uses the "industrial wide corrective programs" to eliminate industrial-wide unlawful practices. The FTC will do the research first and then require violators to stop unlawful practices. If, after a specified period, there are still similar violations, the FTC will consider imposing severe punishment. The approach was approved to be effective in correcting some traditional violation patterns.

3. Engaging in Deregulation Tasks

The FTC places deregulation and regulatory reform as one of its priority tasks and has been active in the deregulation and regulatory reform process. The FTC considers the advocacy process to request relevant agencies to incorporate competition principles in their law very important. If competition principles can be fully taken into consideration when relevant agencies carry out deregulation or liberalisation programs, the relevant markets would involve less misuse of dominant market power and thus the law enforcement would be less necessary. The FTC set up the Deregulation Task Force in December 1996, and conducted a comprehensive review on a large scope of regulated sectors and their competition-related issues and laws in line with the overall process of deregulation. Through ongoing consultation with concerned authorities, many tangible successes have already achieved. For instance, during the deregulation process of Taiwan's petroleum market, the FTC advocated eliminating obstacles to market entry and stress a policy of excluding subsidisation, segregating competition, and setting new market rules. All of these concepts have been incorporated into the draft Petroleum Management Law. The FTC also proactively shared its opinions and work experience in competition policy and law with the Ministry of Transportation and Communications and the Ministry of Economic Affairs for reference in liberalising the telecommunications and electric power markets.

4. Establishing Co-ordination and Communication Channels and Promoting Public Education

The FTC has actively engaged in publicity activities to educate the business community and the general public to understand what the Fair Trade Law regulates, to enable them to recognise the Law and facilitating the enforcement of the Law.

(1) Establishing Co-ordination and Communication Channels

To communicate with other ministries as well as the judiciary is critical to ensure the smoothness and consistency in implementing the Fair Trade Law. The FTC arranges regular programs, seminars, and activities with other administration agencies, judicial departments, and local authorities to promote the Fair Trade Law, and to open up opinions from all sides. These opinions are collected as a major reference for policy-making.

(2) Promoting Public Education and Legal Counselling

The FTC offers a number of courses about the Fair Trade Law for the business community and the general public as a whole. The purpose of conducting such courses is to build up a competition culture within the enterprises and to eventually prevent violations from happening. Beginning in 1994, the FTC conducted the "Fair Trade Law Education Camp" on a regular basis, to train and educate experts on the Fair Trade Law for enterprises. Commissioners and director generals of the FTC lead this special camp, which lasted a total of 72 hours. In addition, the FTC set up a service center to provide business firms and individual persons with consulting services and answer questions so that the general public as well as enterprises could forward their questions and complaints to the FTC directly.

5. Enhancing International Co-operation

The FTC is very keen to engage in international activities.

(1) Holding Bilateral Consultations and Signing Arrangements

The FTC has signed arrangements with the Australian and New Zealand competition authorities and held bilateral consultation meetings with competition authorities of the United States, Canada, New Zealand, Australia, the UK, the EC, the Netherlands and France.

(2) Staff Visit and Exchange

The FTC has had extensive exchanges of visits with officials of competition authorities in the United States, Germany, Switzerland, France, New Zealand, and Japan. Beginning in 1999, the FTC conducted a staff exchange program with the Australian Competition and Consumer Commission on an annual basis.

(3) Providing Technical Assistance

Beginning in 1999, the FTC joined OECD to co-host an international conference on competition policy geared toward helping developing nations develop competition law regimes and cultivate related expertise.

(4) Establishing APEC Competition Policy Database

In May 1999, the FTC completed the initial version of a web site for the "APEC Competition Policy and Law Database". The database contains 14 categories of information regarding 21 APEC member economies' competition policies and laws, to be updated on an ongoing basis. The Completion of

this database demonstrates the close co-operative relationship that exists among member economies for the accomplishment of the first section of collection actions in the Osaka Action Agenda. Not only can member economies promote dialogue and study other APEC member economies' competition policies and/or laws through this database, but also the private sector, including academic organisations and business enterprises, will be able to retrieve useful information from the database for improving trade and investment.

4. Difficulties and Challenges

Although the FTC has some positive experiences that it can share with other countries, the FTC also finds it is facing some difficulties or challenges that must be overcome or solved. Here are some examples:

1. According to the Fair Trade Law, the FTC shall function independently. Although the chairman of the FTC is a member of the cabinet, the FTC need not take orders from the cabinet. However, according to the Law of Administrative Appeal, if someone feels that he or she has been injured by the decision made by the FTC, they can file an administrative appeal to the Executive Yuan (the Cabinet), which reviews the case before a suit is brought to the Administrative Court. The superior agency may change or revoke *ex officio* any administrative act that is patently unlawful or improper. The FTC's discretionary powers are thus substantially limited.

2. In many countries, competition authorities are able to screen complaints and decide whether to initiate an investigation based on the degree of public interest. In Taiwan, according to Article 26 of the Fair Trade Law, "The Fair Trade Commission may investigate and handle, upon complaints or *ex officio*, any violation of provisions of the Law that harms the public interest." However, it is not clear whether the FTC can screen complaints or not, and the majority opinion is that the FTC does not have the power to screen the complaints. In practice, the FTC has to complete investigations on all complaints, unless the FTC finds that complaints are not regarding any violation of the Fair Trade Law. Thus the FTC spends a large share of its resources on small cases and is not able to allocate more resources to deal with important ones. It needs revise the Law to solve the problem.

3. The FTC has nine commissioners. All commissioners are appointed for a three-year term and their terms expire at the same time. Commissioners can be re-appointed, but as most commissioners are from universities, they prefer to go back to their respective universities when their terms expire. Thus there is a serious problem of disruption in regard to continuation and accumulation of experience. A revision of the Law is also needed to solve the problem.

5. The Future

Taiwan's economy and economies around the world are undergoing major structural changes. Political and social developments in Taiwan are taking place at a rapid pace so the existing trading regime and economic concepts must be able to constantly accommodate and adjust to those changes. This is particularly the case as the economy moves toward liberalisation and globalisation. The adoption of fair trading policies and the work of enforcing those policies must be able to take into consideration both industry development and consumer interests if it is to bring the FTC's existing objectives and capabilities into full play. The FTC in the future will focus on the following tasks:

1. Establish A Comprehensive, Non-discriminating, Transparent, Accountable Fair Trading Regime

As we face such trends as economic globalisation, market liberalisation, rapid changes in the industrial structure, and rapid developments of hi-tech industries, competition authorities should continuously adjust the "game rules" of trade, establish a comprehensive, non-discriminating, transparent, and accountable competition framework taking into consideration of both rapidly growing and traditional industries, and eliminate unnecessary entry barriers. The FTC will reassess supporting regulations and case handling guidelines related to the Fair Trade Law, and reassess anti-competitive regulations in co-ordination with relevant authorities to deregulate unnecessary controls.

2. Initiate a Self-Compliance Framework For Firms

Although the Fair Trade Law has been in effect for more than nine years, many industries are still not well aware or familiar with its provisions. The FTC will help industries establish a framework for self-compliance so as to help avoid violations with the Fair Trade Law. Therefore, the FTC will play the role of a "supervisor of the market trading order". In order to optimally utilise limited administrative resources, the FTC will follow the precedents of the competent authorities of advanced economies in which the public's interest and overall economic interest are used as a basis for consideration in the handling of cases.

3. Construct a Competition Framework For Deregulated Industries and 4C Industries

In the past, public utilities such as telecommunications and power companies were classified under naturally monopolistic industries and were government regulated. But in recent years, technology has advanced rapidly. New production methods have continuously replaced old ones, those industries can segment their services, and can trade their products in the market as ordinary commodities. Therefore, the supply and demand of telecommunications services should be decided by market competition. Taiwan has in recent years made marked progress in opening to competition the telecommunications service and oil product public utility industries, and the FTC has continued to participate in establishing a post-opening market competition mechanism. In the future, the opening of controlled industries will be further broadened and deepened, and other monopoly public utilities will also be inevitably opened. In response to these economic changes, appropriate arrangements must be made so anti-competitive and unfair practices caused in the future can be corrected, and in the process, a competition framework for each public utility industry can be established.

As commercial application of Internet has boomed, the business opportunities generated by the Internet have expedited the integration of 4C industries, namely telecommunications, cable television, information communications, and e-commerce enterprises. The FTC will establish a competition framework for 4C industries, so that it will be fully prepared to handle competition issues arising from cross industry operations, and decide the timing for competition law to intervene.

4. Expand Forward-Looking International Interchange And Co-operation

Since the 1990s, due to a large increase in the operational scale of enterprises world-wide and the global trend toward merger and acquisition, the global competition environment has undergone fundamental changes prompting competition authorities world-wide to strengthen co-operation on issues such as transnational annexation, international cartels, and regional monopolies in order to harmonise the complex body of regulations currently in place. How best to prevent anti-competitive practices and promote global market liberalisation are pressing questions being asked in multilateral trading blocs and bilateral trade discussions.

The FTC must have a firm grip on these developments and trends, and promote capacity building for the Fair Trade Law enforcement in response to international trends. The FTC has given top priority to international exchange programs and co-operation. In the future, the FTC will continue expanding channels of dialogue and participating in the activities of international trade organisations. The FTC will also expand its competition law frameworks technical assistance so that its contribution to the international community can continue.

II. – DESCRIPTION OF CASES

Case 1

A complaint alleging the Taiwan Flour Mills Association instituted a total quantity control and quota system when jointly purchasing and importing wheat for 32 flour producers, by means of co-ordination and acting in concert, and by calling meetings, which had the effect of restricting competition and violated Article 14 of the Fair Trade Law.

Summary:

The Taiwan Noodle Producers Association (the "Noodle Association") filed a complaint with the Fair Trade Commission (the "Commission") alleging that flour producers attempted to increase flour price by jointly reducing their wheat purchases.

The Commission undertook a through investigation after receiving the complaint. To obtain the information concerning the production, sales and the current market situation in the flour industry, the Commission not only sent survey of market structure to upstream flour producers and downstream wholesalers and retailers but also requested the Taiwan Flour Mills Association (the "Flour Association") to submit information on its members' production capacities, equipment utilisation rates, outputs, sales, raw materials imports, and unit prices for comparison purpose. The Commission also invited more than 10 representatives of flour producers to provide in person their justifications for the alleged misconduct. The followings are the results of the investigation.

Under the approved joint purchasing policy, the current 32 flour producers in this country appeared to have reoriented the overall industry around the principle of "co-exist and co-prosper." In 1997 and 1998, flour producers attended meetings to apportion their import quantities. In July of 1998, the Flour Association effectively intervened in each member's inventory management by implementing what it called the "Inventory Allocation and Supplementation Table." In October of 1998, a general meeting was called by the Flour Association to discuss the predetermined import quota for 1999.

According to Article 14 of the Fair Trade Law, no enterprise shall have any concerted action. It is obvious from the results of the investigation that the Flour Association used resolutions to implement a total quantity control and quota system, and had improperly intervened in each member's inventory management, in violation of Article 14 of the Fair Trade Law. The Flour Association was the entity that committed the concerted action. Its subordinate entity, the Allocation Working Group, organised "purchase allocation meetings" in which agreements were reached and then notified to each member for further implementation. Those agreements consisted of purchase quota and predetermined annual import quantities. The Flour Association's institution of a total quantity control and quota system had restricted enterprises' freedom to determine their own purchase quantities. It improperly intervened in each member's inventory management and obstructed fair competition among enterprises. Its objective was to restrict each

member's output level and thereby to reorient the overall industry around the principle of "co-exist and co-prosper."

In sum, the aforesaid actions having the effect of restricting competition constituted concerted behaviour prohibited under Articles 7 and 14 of the Fair Trade Law. For these reasons and in view of the degree to which the offences impede the trading order, the period the concerted action had lasted, the Flour Association's market position, and the fact that the Flour Association committed the acts despite knowing they were illegal, the Commission ordered the Flour Association to cease these practices within the specified period, and imposed the Flour Association a fine of NT$20 million pursuant to the forepart of Article 41 of the Fair Trade Law. The Flour Association's actions also exceeded the scope of the decision dated December 31, 1997, ref. (86) Kong Lien Tzu No. 012, in violation of Article 16 of the Fair Trade Law. The Commission therefore rescinds the decision granting the aforementioned approval.

Case 2

Taiwan Power Company improperly restricted the criteria to bid on its contract to procure truck-mounted mobile cranes, and Ying Heng, et al., fixed the bidding, in violation of the Fair Trade Law

Summary

1. Crane suppliers complained that Taiwan Power Company, ("Taipower") set improper restrictions in the criteria to bid on its procurement contract of truck-mounted mobile cranes (#8700017). The restrictions required that submitted bids on the contract include truck retailer's after-sale service certificates and crane manufacturer authenticity certificates to prove that the suppliers were authorised vendors and able to provide after-sales service. They alleged that the restrictions would be likely to enable the truck manufacturers to dominate the market. The Fair Trade Commission's (the Commission's) preliminary finding was that six companies, including Ying Heng, were suspected of bid fixing.

2. Taipower procured 33 mobile cranes in April 1998, and by November of that year, it had procured a total of 80 units for a total procurement price of NT$200 million. Before the bid opening in April 1998, Fu Ch'uan, Ying Heng's long-time co-operative supplier, had already indicated the details of the future outcome of the bid opening on its progress board, and Ying Heng had already imported 26 of the cranes. Ying Heng was the organiser of the bid fixing. He T'ai and Shun Yi controlled the truck chassis after-sales service certificates and truck chassis functional test reports. He T'ai and Shun Yi turned down requests for the certificates and reports from suppliers who were not a party to the bid fixing, so as to hoard the profits from the sales of the truck chassis. In addition, a winning bid for six cranes was apportioned to Hsi Fu. Ying Heng provided catalogues of truck chassis, the manufacturer of which it used to be an agent for, to Ching Ch'i and Hao Ch'eng, for their use in participating in the bid fixing.

3. Ying Heng, Hsi Fu, Hao Ch'eng, Ching Ch'i, He T'ai, and Shun Yi fixed the bidding for the contract. They knowingly, and through mutual communications, apportioned the number, suppliers, and amounts of the winning bids before the bid opening. These acts violated Article 14 of the FTL, which prohibits concerted acts. The Commission ordered them to immediately cease the concerted acts pursuant to the forepart of Article 41 of the FTL in force at the time of the acts.

4. The improper restrictions precluded suppliers, who could not obtain the certificates and the reports, from participating in the bidding, and they enabled the truck manufacturers and some of the crane suppliers to restrict and apportion the participants and the winners of the bidding by virtue of their control over the certificates and the reports. This was likely to compromise free market mechanisms, and it constituted obstruction of fair competition in violation of Article 19(1)(ii) of the FTL. Therefore, the Commission ordered Taipower to immediately cease its act of discriminating against other enterprises without a proper reason, pursuant to the forepart of Article 41 of the FTL in force when the act took place.

Case 3

Merger application between Ch'un Chien CATV Co., Ltd. and Wei Da CATV Co., Ltd.

Summary:

1. Concerning the application for enterprise merger in which Ch'un Chien CATV Co., Ltd. ("Ch'un Chien") would be assigned the major assets and operations of Wei Da CATV Co., Ltd. ("Wei Da"), the 438th Commissioners' meeting on March 29, 2000 ruled that the application for merger shall be rejected pursuant to Article 11(2) of the Fair Trade Law due to the reasons that the merger as a whole would not bring about obvious economic benefits and that it would cause significant disadvantages through restraint of competition.

2. Ch'un Chien aims to take over Wei Da's major assets and operations in this merger. If successfully combined, the number of subscribers in Ch'un Chien's approved operating districts would total more than 180 thousand when the combined company begins broadcasting operation, making it the largest domestic cable operator. The scale of its operation exceeds the reasonable limit of 150 thousand subscribers for each permitted district of operation-an important indicator drawn up for the "Study of the division of cable TV operating districts in Chinese Taipei" and used by the Government Information Office as its reference in dividing up cable broadcasting and television operating districts. Furthermore, though the market status quo of direct satellite broadcasting operation does imply some degree of interchangeability between satellite and cable operators with respect to technical services, Ch'un Chien will be capable of only a limited degree of competition against direct satellite broadcasting operators for a fairly long time to come, considering the differences with regard to the type of channels they provide, the number of channels, and the fees they charge. So Ch'un Chien would be in a highly advantageous position in its current approved business. Judging by the degree of market saturation and the number of competitors in the cable television market, the realisation of the merger will result in an obvious disadvantage toward competition and it would not bring more economic benefits to upstream channel providers and end-consumers. There is, consequently, no logical necessity for the merger.

3. The realisation of the merger would indeed also reduce the initial costs for layout of the cable television system's industrial network and equipment, avoiding a waste of resources caused by overlapping networks, and by so doing Ch'un Chien would enhance its chances of acquiring cross-business operations. But according to current market practices, when stepping into telecommunications business, cable television operators mainly conduct circuit leasing business or invest in fixed line businesses; and when stepping into information telecommunications business, they mainly enter into strategic alliances with Internet service

providers. The fulfilment of the merger does not therefore have the significant relevancy or necessity for the promotion of cross-business operations for cable television operators-it has only internal economic benefits for the enterprise but no significant external economic benefits. There are no concrete proposals in the application for merger regarding how to prevent restraint of competition or externalise its internal interests.

4. Taken into consideration is also the fact that operation of a cable broadcasting and television system is a concession business which requires considerable time in preparation for establishment - three years or more to be specific - from network rollout, inspection of established engineering by authorities, to obtaining operation permit. The enterprises involved in this merger are approved cable broadcasting and television operators competing with each other in the same market district. After the combined company began operation in accordance with the Cable Broadcasting and Television Law, it would impose an entry barrier on new operators within a considerable period of time, even though new operators would enter into competition as application for new launches reopens pursuant to Article 33 of the same law.

5. To sum up, undertaking the merger would not have significant economic benefits and would result in disadvantageous competition. The case is rejected by the Commission pursuant to Article 11(2) of the Fair Trade Law.

Case 4

Twenty-seven cylindered Liquefied Petroleum Gas (LPG) distributors in southern Taiwan engaging in concerted action to raise fees for delivery and filling services and to raise the price of cylindered LPG in violation of the Fair Trade Law

Summary:

1. This case originated from the increases of LPG prices for five times by China Petroleum from November of 1999 to March of 2000 due to the rise of international oil prices during the period of 1999 to 2000. Among those price increases, the highest one occurred on March 28, 2000, with an increase rate of 20%. It had thereby resulted in the increases of the delivery, filling and retailing prices for cylindered LPG at the downstream market. The Fair Trade Commission (the Commission) conducted this investigation after receiving numerous complaints from both consumers and end distributors. It is the finding of the FTC that the previous charges for filling and delivery of cylindered LPG was around NT$1 per kilogram; however, agreements among distributors had raised the price to NT$2 in the Kaohsiung-Pintung area and NT$2.2 in the Tainan area. This meant an extra cost of about NT$30 per 20-kilogram cylinder, leading to the complaints from retailers about cost increases.

2. Findings:

   (1) In the early 90's, prior to the introduction of the Fair Trade Law, the distribution of LPG was administered by the Vocational Assistance Commission for Retired Servicemen. Service charges for delivering and filling cylindered LPG were regulated at the price of NT$1.91 per kilogram in the southern area of Taiwan. However, prior to 1996, competition between the filling stations and the differences in their costs of major transportation had driven the real delivering and filling charges down to NT$1.2-1.4 in the Kaohsiung-

Pintung area, NT$1.5-1.85 in the Tainan area, and NT$2.2 in the Chiayi area. Thus, three distinct geographical markets for the delivery and filling of LPG were formed in the Kaohsiung-Pintung, Tainan and Chiayi regions.

(2) Development of concerted action: The Commission found that among the 30 filling stations in the southern region, aside from the three in Chiayi who were not involved, the Tainan market where 8 stations were included and the Kaohsiung-Pintung market where 19 stations are included are two separate relevant markets. Prior to the March of 2000, due to lower transportation costs, stations located in the Kaohsiung-Pintung area were able to compete with those in the Tainan market. While in March, by taking the opportunity of the efforts made at Safeway Gas's Kaohsiung plant by the "LPG Safety Management Foundation", which was established by operators at different levels of the distribution chain, to raise a fund of NT$30 million by soliciting contributions from filling station operators, a motion was put forward that the operators in the two markets decide on a three-tier pricing system that would reflect differences in their major transport expenses, with NT$2 for the Kaohsiung-Pintung area, NT2.2 for the Tainan area, and NT$2.5 for the Chiayi area. Operators attempting to distribute in two different areas were required to apply the prices set for each respective area to avoid abrupting the new market system. With the exception of operators in the Chiayi area, all participants in the organisation agreed to the pricing scheme, and a "market stabilisation fund" was set up along the lines of the "Gas Safety Management" foundation mentioned above; contributions were said to be for a "mutual assistance fund." Operators in the Kaohsiung-Pintung area were relatively more willing to abide by the new pricing scheme, and continued to hold another meeting right after the first one was completed to form consensus regarding the new scheme among the filling station operators in the area. It was decided that implementation of the agreement could be left to the respective associations of the operators in the three areas, and while the operators in Chiayi still disagreed, the new pricing scheme had been uniformly adopted in the Tainan and Kaohsiung-Pintung areas by March 3, 2000.

(3) Implementation of the concerted action: In order to facilitate the accomplishment of its goals of raising the prices for LPG and restraining the number of operators for downstream LPG retailers, operators of filling station held meetings at irregular intervals to collude on the means applicable to the control of the cylindered LPG market. Between the March and July of 2000, those in the Kaohsiung-Pintung area met repeatedly, first on March 3 in Kaohsiung to conclude the price-increase agreement and the establishment of stabilisation fund, then on March 10 in Pintung to confirm that the price agreement would take effect next time China Petroleum raised its price on LPG (on about March 28). It was further decided that payments by the operators to the stabilisation fund would be divided into two categories, depending on whether the volumes handled were above or below 500 metric tons, and that all operators must additionally pay a miscellaneous fee of NT$0.2 per kilogram. To buffer the backlash from downstream retailers and make it easier to collect the fees, operators sent representatives to persuade local industry associations and to smooth over customer-swaying disputes among retailers, as well as to encourage retailers to pass expenses on to end users. Retailers who refuse to accept the scheme were threatened with supply interruption. Due to the facts that any attempt to switch to other filling stations would be rejected by the operators with various excuses, retailers were in effect deprived of the liberty to choose its own filling stations. As a result, competitive mechanisms in the entire LPG market in the southern region were seriously disrupted, affecting nearly 1000 retailers in that area.

3. The 27 firms involved in this case were all at the "filling station" level within the vertical distribution structure of the household LPG market, and were "competitors" in their respective Kaohsiung-Pintung and Tainan markets and were capable of being qualified as members of a concerted action under law. The alleged concerted action was operated through continued meetings to set fees and agreements to divide customers, which had the effect of restraining trading counterparts, prices and other business activities. Following the completion of the agreements to raise prices, measures to implement those agreements were always put forward and adopted by all members. There are 19 of the 21 filling stations in the Kaohsiung-Pintung area that involved in this case accounted for 97% of the total volume sold, sufficient to affect supply and demand functions in that market. The eight stations in the Tainan area accounted for over 80% of the volume sold there, with only an exceptionally small portion of the demand in that market served by operators from the Kaohsiung-Pintung region. The conduct of the operators involved had violated Article 14 of the Fair Trade Law, which prohibits concerted action.

The Commission based its assessment of administrative fines on several factors, including the size of the operators, their profitability, degree of co-operation with the investigation, past records, and whether they had played a leading role in the pricing scheme. The Tainan and Kaohsiung-Pintung areas constitute two separate markets, thus the Commission issued dispositions respective to those areas in accordance with the fore part of Article 41 of the Fair Trade Law. Administrative fines of between NT$1 - 1.5 million were assessed. In the Kaohsiung-Pintung area, three involved stations-Safeway Gas, Kao Fa, and Hsin Feng-a fine of NT$15 million was respectively imposed; Chien Huey and Kuo Hui each was fined NT$8 million; Another 11 were fined NT$4 million individually-Chian Chang, Yi Ch'un, Jung Chou, Feng Yi, Kao Hsiung, Shih Hsin, Tung Yi, Nan Ch'eng, Hsin Ch'eng, Hsin Lian and Ho Sun Shin; Hung Li, Ying Neng, and Ch'i Mei were fined NT$1 million respectively. In the Tainan area, San Yan received a fine of NT$8 million; Yi Lin, Hsueh Chia, and Ch'uan Shuai each received a fine of NT$4 million; Chung Hua Li was fined NT$2 million; and Lian Ho, Ta Tung, and Nan Ya each received a fine of NT$1 million. The total amount of fines assessed for deterrent purposes was NT$133 million.

III. – QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

1. Citations and relevant information for hard core cartels challenged by Chinese Taipei Fair Trade Commission (hereinafter referred as the "FTC") since January 1, 2000 has been listed as Annex.

Regarding the rationale for the level of competition sanction, The FTC has issued its sentencing guidelines to ensure proper and fair imposition of fines. The guidelines reveal the FTC will, while imposing an administrative fine, take into account the motive and purpose of the violation, anticipated and real excess profits from the violation, the degree of damage to the trading order, violator's scale of business and its market position, violators' previous records of breaching the Fair Trade Law, and whether the violator is cooperative with the FTC's investigation, etc.

2. Facts illustrated the harmfulness of cartels could be found on cases such as the followings:

(a) Changes in price or output when the cartel was formed or ceased: Taichung Harbor Warehousing and Loading Co., DerLong Warehousing and Loading Co., and Taichung Harbor Administrative Bureau all engage in loading and unloading business in Taichung Harbor. From 1982, decided to keep peaceful relationship and avoid competition, they divided the loading and unloading business within Taichung Harbor. They even attended the ships dispatching meetings to negotiate with ship owners to trade with them in turn. This collusion destroyed competition between loading businesses, and restricted ship owners to choose loading company to provide services. In 1999, the lack of competition in Taichung Harbor's loading business caused the rate for loading scrap iron in Taichung Harbor is 20% to 120% higher than that in Keelung Harbor or Kaohsiung Harbor, and the efficiency for unloading scrap iron was 2,180 ton per day in Taichung Harbor and 3,164 ton per day in Kaohsiung Harbor. Besides, in 1998, the average cost for Taichung Harbor Warehousing and Loading Co. was NT$103 per ton, and NT$128 per ton for DerLong Warehousing and Loading Co. However, the two companies had almost the same trade volumes. Obviously the collusion severely distorted the resources allocation.

(b) Changes in firm profits when the cartel was formed or ceased; excess profits during the cartel:
ChungChen Co. and other four Cable TV system operators provide Cable TV signal transmission services in south Kaohsiung City. In 1999, they reached a consensus to jointly decide the subscription fee to be NT$2,500 for half a year and do not deal with others' customers. This cartel existed from 1999 September to December, estimated excess profits for ChungChen Co. was NT$ 40 million, NT$ 20 million for another two system operators respectively and NT$ 12 million for the other two.

3. To ensure compliance, the Fair Trade Law empowers the FTC to issue cease and desist order, to require the violator to correct its illegal practices, to require divestiture of an enterprise engaging in illegal merger, and to impose administrative fines up to NT$50 million (about US$1,430,000) per offence. The FTC is equipped with investigation power for obtaining documents and testimony, and discovery of illegal practices. Despite the fact that the court and the prosecutor also have competence in these matters, the enforcement still largely falls upon the FTC. Even in a court case will the judge usually asks for the FTC's opinion. Criminal behavior would be referred to the public prosecutor's office if the violators fail to comply with the FTC's order. Criminal sanctions may take the form of either imprisonment up to 3 years or criminal fines up to NT$100 million per offence or both. The injured may seek compensation from the violator up to three times of the amount of damages.

4. The FTC's sentencing guidelines asks the FTC, while imposing an administrative fine, to take into account the motive and purpose of the violation, anticipated and real excess profits from the violation, the degree of damage to the trading order, violator's scale of business and its market position, violators' previous records of breaching the Fair Trade Law, and whether the violator is cooperative with the FTC's investigation, etc.

According to the Criminal Law, factors which should be considered for calculating fines and other sanctions for economic law violations or crimes in general include the followings: purpose, motive, method, living standard, moral, awareness of the violator, damage caused by the violation, and whether the violator is cooperative with the investigation.

The maximum penalty for violating the Fair Trade Law is up to NT$100 million and/or up to 3 years imprisonment, for procurement fraud is up to NT$ 3 million and/or up to lifelong imprisonment, for tax fraud is up to 3 times of illegal profits, for securities fraud is up to NT$ 3 million and/or up to 7 years imprisonment.

Appendix to the questionnaire on Anti-Cartel Actions

	Citation	Respondent's name	Product or service	Geographic area	Beginning and ending of dates	Evidence of collusion	Amount of commerce	Sanctions	Other orders
1	Five manufacturers of surgical suture line bidding for 1998 National Taiwan University Hospital procurement of surgical suture line raised the bidding prices in concert	Surgitech Corporation, Unik Surgical Sutures Mfg Co., Johnson & Johnson Medical Taiwan, Ta Sheng Co. Ltd., and B. Braun Taiwan Co., Ltd.	surgical suture line	National Taiwan University Hospital procurement of surgical suture line in 1998	1998/8	Indirect; the surgical suture line market is oligopoly, transparency of prices in the market is high. The prices for very surgical suture line fell from NT$90-120 per line in 1995 to NT$40-100 in 1997; however, the prices of the participants in this tendering rose substantially to around NT$120 in 1998.	N/A	N/A	No
2	Ying Heng Co. and other five companies fixed the bidding for Taiwan Power Company's procurement of truck-mounted mobile cranes	Ying Heng Co., His Fu Co., Hao Ch'eng Co., Ching Ch'i Co., He T'ai Co., and Shun Yi Co.	truck-mounted mobile cranes	Taiwan Power Company procurement of truck-mounted mobile cranes in 1998	1998/2 -- 1998/11	Indirect; through mutual communications, apportioned the number, suppliers, and amounts of the winning bids before the bid opening.	The truck-mounted mobile cranes market over the economy, about 200 million NT.	N/A	No

	Citation	Respondent's name	Product or service	Geographic area	Beginning and ending of dates	Evidence of collusion	Amount of commerce	Sanctions	Other orders
3	Two airlines engaging in concerted acts of unconditionally endorsing and transferring ticket vouchers	Far Eastern Air Transport and TransAsia Airways	Domestic airline services market	Taipei-Kaohsiung, Taipei-Tainan, and Taipei-Chiayi routes	1999/8/1 -- 2000/3	Direct;	N/A	Far Eastern is fined NT$2 million and and TransAsia is fined NT$1.5 million	No
4	Chinese Motion Picture Advertising Association restricted media advertising prices	Taipei City Film and Theater Industry Association and the Taipei City Film Business Industry Association	Newspaper movie advertising	Taipei City and Taipei County	Rate Restrictions: 82.8.18-89.3.21; Layout Restrictions: 86.12.15-89.3.21	Direct	N/A	Imposing a fine of NT$1.5 million on each of its members	No
5	Twenty-six premixed concrete businesses engaged in restricting supply, inflating sales prices and shortening supply times	Chia Hsin Ready-Mixed Concrete Co. and other Twenty-five companies	Premixed concrete	Taoyuan County	1998/3 -- 1998/9	Direct	During the cartel, average sales amount per month is NT$750 million, total sales amount of the cartel is about NT$5 billion.	No	N/A

6	Producers of teaching materials for handcraft mutually restricted each other's business activities through forming an association.	Tsai, Lily and other fourteen firms	Teaching material for handcraft	The whole economy	1998/5 – 1999/10	Direct	N/A	Imposing a fine of NT$ 50 thousand on each member.	No
7	Liquefied petroleum gas distributors in the Tamshui area jointly raised prices	Tamshui Coal Gas Co. and other fourteen companies	Cylinder LPG	Tamshui Town	1999/5 -- 2000/5	Direct	The price for per cylinder LPG has been raised from NT$400 to NT$500.	Imposing a fine of NT$100 thousand on each member.	No
8	Companies engaged in bid riggings in tendering for three street light engineering contracts by Kaohsiung City during 1996 and 1997	Shang Kuan Mechanical and Electrical Engineering Ltd., and other four companies.	Street light engineering contracts by Kaohsiung City during 1996 and 1997	Kaohsiung City	1996 -- 1997	Direct	Guarantee money for the three tendering is NT$ 450 thousand, NT$ 500 thousand, and NT$ 600 thousand respectively.	No	No
9	Taiwan Flour Mills Association instituted a total quantity control and quota system via jointly purchasing and importing wheat for flour producers	Taiwan Flour Mills Association	Flour market	All over the economy	1994 -- 2000	Direct	About NT$7 billion.	Imposing a fine of NT$ 20 million	No

10	Five Cable TV programming providers jointly sell TV programs	Sheng Ch'I Co., Ltd., He Wei Broadcasting Co., Ltd., Mu Ch'iao CATV Co., Ltd., ERA Communications, Ltd., and Gala International, Ltd.	Cable TV programs	Kaohsiung City and Kaohsiung County	1999/12 – 2000/1/6	Direct	In 2000, total channel authorization fee cost NT$341 million, and separately: Sheng Ch'I: NT$93 million He Wei: NT$77.5 m Mu Ch'iao: NT$77.5 million ERA: NT$62 million Gala : NT$31 million	The FTC fined: Sheng Ch'I for NT$9 m, He Wei for NT$8 m, Mu Ch'iao for NT$8 m, ERA for NT$4.5 m, and Gala for NT$1.5 m	No
11	Companies jointly purchased Cable TV programs	FonShing Cable TV System Operation Co. and ChunShinHung Cable TV System Operation Co.	Cable TV programs	Kaoshiung County	1999/12 – 2000/1	Direct	Total amount is NT$ 235,624,000, for FonShing NT$ 161,520,000, and for ChunShinHung NT$ 74,104,000.	Imposing a fine of NT$ 500 thousand.	No

12	Collusive bids on a primary school's repair plan	Mr Hsieh Fu-ming, Mr Yang Hao-lin, and Ming Yi Construction Co.	Repair plan of a primary school	Tainan County	During 1994	Direct	NT$ 3.968,000	No	No
13	Cable TV system operators jointly raised subscription fee and restricted each other's trading counterparts	ChungChen Co. and other four Cable TV system operators	Cable TV signal transmission services	South Kaohsiung City.	1999/8 – 1999/12	Direct	Illegal profits for ChungChen Co.: NT$ 40 million, for another two system operators: NT$ 20 million respectively, and for the other two NT$ 12 million	Imposing a fine of NT$ 5 million for ChungChen Co., NT$ 2.2 million for another two system operators respectively, and NT$ 1.8 million for the other two.	No
14	Companies jointly purchased soybean cargo without the FTC's effective approval	Fu Mao Oils Co., Ltd. and other five firms	Imported soybean	North part of Chinese Taipei	2000/4/18, 2000/5/4, 2000/5/8	Direct	N/A	Imposing a fine of NT$ 100 thousand for each member	No
15	Three loading companies collusively divided the loading and unloading business in Taichung Harbor	Taichung Harbor Warehousing and Loading Co., DerLong Warehousing and Loading Co., and Taichung Harbor Administrative Bureau	Loading and unloading business in Taichung Harbor	Taichung Harbor	1982 – 2000	Direct	N/A	No	No

16	Three LPG suppliers jointly raised the price for cylindered liquefied petroleum gas (LPG) in the Cheng Gung Chen area of Taitung County	Kuo T'ai, Ta Chung, and Yung Hsin	cylindered liquefied petroleum gas	Cheng Gung Chen area of Taitung County	2000/2 – 2000/3	Direct	N/A	Each violator is fined of NT$ 100 thousand.	No
17	Pharmaceuticals jointly fixed price for pharmaceutical products.	Forty-eight members of Tainan Area Association for Scholarship and Fellowship in Pharmaceuticals Field	Radio-advertised pharmaceutical products	Tainan City and Tainan County	1986/11 – 2000/4	Direct	N/A	Total amount of fine is NT$ 8.35 million.	No
18	Bid rigging in several bids for Taiwan Power Co.'s procurement of parts of power generators.	DunYao Co. and other nine firms	Parts of generators for power plants.	The whole economy	1997	Direct	N/A	No	No
19	Suppliers fixed prices for premixed concrete in Yunlin County	BaoChao Co. Ltd., and other fourteen companies	Premixed concrete	Yunlin County	1999/1 – 1999/12	Direct	NT$ 200 million per month, NT$ 1.8 billion during the cartel	Imposing a fine of NT$ 100 thousand for each member.	No
20	Suppliers fixed prices for premixed concrete in Changhwai County	TaiSun Co. Ltd., and other twenty-six companies	Premixed concrete	Changhwai County	1999/1 – 1999/12	Direct	NT$ 300 million per month, NT$ 2.7 billion during the cartel, estimated illegal profits exceeds NT$ 100 million.	Imposing a fine of NT$ 100 thousand for each member.	No

21	Companies engaged in bid rigging for Taiwan Power Co.'s power distribution line construction bids during 1995 - 1999	ChingShin Water and Electricity Engineering Co. and other six companies	Taiwan Power Co.'s power distribution line construction bids	Pingdong County	1995/5 – 1999/1	Direct	N/A	No	No
22	Furniture firms jointly restricted competition through forming trade association	Chaing, charong and other furniture firms	Furniture exhibition market	All over the economy	1999 – 2000	Direct	N/A	Imposing fines for violators ranging from NT$ 50 thousand to NT$ 300 thousand	No
23	Restricting members to attend any exhibition held by any agency other than the two associations	Trade Association for Shoes Business in Taipei County, and Trade Association for Leather Products Business in Tainan County	Shoes exhibition market	All over the economy	1999/3 – 2000/2	Direct	N/A	Imposing a fine of NT$ 500 thousand	No
24	Patent holders jointly licensed their patent rights to potential licensees	Philips Co. Ltd., Sony Co. Ltd., and Taiyo Yuden Co. Ltd.	CD-R	All over the economy	1997 -- 2000	Direct	Royalties in 2000 nearly equals to NT$ 10 billion.	Philips is fined for NT$ 8 million, Sony for NT$ 4 million, and Taiyo Yuden for NT$ 2 million	No

25	Distributors of cylinder LPG jointly raised price and restricted competition	Bai-I Industry Co. and other twenty-six distributors of cylinder LPG	Bottling and distribution of cylinder LPG	South part of Chinese Taipei	2000/4 – 2000/12	Direct	Estimated illegal profits exceeds NT$ 200 million	Total amount of fines equal to NT$ 133 million	No
26	Trade Association for LPG Business in Hualian County requested members to raise retailing price	Trade Association for LPG Business in Hualian County	Cylinder LPG	Hualian County	2000/4 – 2000/6	Direct	N/A	Imposing a fine of NT$ 600 thousand	No

IV – CONTRIBUTION TO SESSION II

By Dr. Hwang, Tzong-Leh
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Like many economies in their early stage of economic development, Chinese Taipei used to regulate the economy in a heavy-handed manner. But the successful economic growth of the economy and changes in global trading environment of the last few decades initiated the call for transformation into a free market to sustain a further economic stability and prosperity. In a series of economic reforms starting from 1980s, the enactment of the Fair Trade Law (the "Law") in 1992 signifies a milestone in the progressive transition and lays the foundation for the acceleration of the transition.

Based on its past experience in implementing other economic laws, the government has foreseen that sound and effective enforcement of the Law rely on sufficient awareness among the business communities, the government agencies, the academic, and the general public who are all major players in market economy. Recognising that a competition culture needs to be built among these players when the Law was first enacted, the Fair Trade Commission (the "Commission") identified this mission as one of its priorities to ensure the efficiency and quality of enforcement work.

To better explain the Commission's efforts in "building a competition culture", the presentation will be made in the following three ways: strengthening public awareness, improving regulatory environment, and promoting research on competition issues.

1. Strengthening Public Awareness

An important function of the Commission is to conduct compliance educational programs aiming at encouraging the business communities to comply with the Law when formulating their business strategies. Another mandate of the Commission is to help the general public to understand what the Commission does for them and request them to support the Commission's enforcement work. The Commission conducts public compliance education activities through the following means to ensure broad coverage:

(a) To provide up-to-date enforcement information through the mass media, including radio, television, and the press, to advertise on public transport, and to release publications on the enforcement strategies, priorities and achievement;

(b) To brief to the press on a weekly basis on the decisions of the Commissioners' Meeting and hold special media conference where urgent matter arises such as undue pricing during natural disaster or pyramid selling scheme, to attract attention of the relevant businesses and the general public;

(c) To administer external liaison programs to enhance communication, including two regional enquiry offices where staff handle calls and visits from the general public, the enquiry offices handle more than 10,000 calls annually;

(d) To convene workshops, over 1000 by September 2001, for all kinds of business activities in conjunction with trade associations and other bodies;

(e) To conduct 36 or 72-hour lecture programs for managerial-level employees of firms, providing focused discussions on aspects of the Law, the Commission has graduated 28 "classes", bringing the number of "graduates" to over 1,550 by September 2001;

(f) To adopt business correction programs to issue warnings and corrective measures on an industry-by-industry basis when certain improper trade practices are found to cut across entire business sector, the Commission has issued business correction programs on 35 sectors, including the real estate and the Cable TV industries; and

(g) To response to the business communities' request to help firms to establish frameworks for self-compliance so as to avoid violations to the Law.

2. Improving Regulatory Environment

Chinese Taipei used to regulate the economy in a heavy-handed manner. Despite the passage of the Law, before 1999, the provisions of the Law were not applicable in areas where other legislation already applied. In this regard, the Commission devoted numerous resources to minimise this exemption and to create a regulatory environment which fits into the spirits of market economy. The Commission has:

(a) Always advised the regulatory agencies during the formulation and development of laws, or consulted with government agencies to revise or repeal the existing laws so as to ensure compatibility with the spirit of market economy;

(b) Established a task force in 1994 to investigate and examine all the existing other laws that provided a legal basis for exemptions under the Law. The task force had held 19 meetings with responsible government agencies to review such other laws and reached consensus that a total of 122 provisions in 74 laws should be amended. The review and consultation work have been integrated into the Commission's on-going effort;

(c) Set up a deregulation task force in 1996 to identify and remove unnecessary or undue regulatory control, to review and to assess competition in highly concentrated markets, and to identify and review trade and investment barriers. The Commission then listed initial findings in the Cable TV, the telecommunications, the petroleum and many other sectors, released sector specific guidelines to clarify the Commission's regulatory approach under the Law, and drawn up reform plans for the Cabinet; and

(d) Closely monitored the regulatory reform of public utilities such as telecommunications and the energy sector to prevent misuse of dominant position, cross-subsidisation and undue pricing of the incumbent. The Commission has been co-operating with the regulatory bodies to introduce competition provisions to restructure state monopolies into competitive ones and to co-regulate them in a newly de-centralised market situation.

In 1999, the Law was substantially amended. One of the new provisions requires that the Law should not be applied to acts performed in accordance with other laws only if such other laws do not

conflict with the legislative purpose of the Law. The amendment thereby affirms the spirit and content of the Law to be the core of the economic policy.

3. Promoting Research on Competition Issues

The Commission has placed much importance on the improvement of enforcement quality. In order to improve the Commission's work, much attention is devoted toward the exchange of knowledge with the academic and to strengthen co-operation with counterparts overseas, so as to draw on their expertise and to help review the work of the Commission. The Commission thus

(a) Requests scholars and experts to do researches on developing issues, convenes an annual workshop to address the research results and to receive comments from the academic and the public;

(b) Publishes the academic journal – Fair Trade Quarterly, and awards scholarship to graduates majoring in competition law related topics so as to encourage the academic to devote themselves into this newly developed area;

(c) Holds liaison meetings periodically with the prosecutors and judges, to exchange views on the concepts of competition laws, to harmonise the difference between the dual-track systems of the administrative and the judicial, and to co-ordinate the enforcement work where appropriate;

(d) Convenes international conferences regularly to review the enforcement work the Commission has achieved, to compare the philosophies and the methodologies that different authorities adopted, and to explore developing and common issues with foreign competition authorities and international organisations;

(e) Establishes the Competition Policy Information and Research Center to strengthen communications with the academic and to serve as a focal point for studying competition laws and policies. The Center currently, among other works, holds speeches on competition issues twice a month and publishes newsletter on the work of the Commission;

(f) Participates in international conferences to keep abreast with the global trend, holds bilateral talks with foreign counterparts regularly to exchange knowledge and experience on competition issues, and conducts staff visits and exchange programs to enhance mutual understanding;

(g) Sponsors the establishment and maintenance of the APEC Competition Law and Policy Database to pursue the collective goal of the APEC member economies in strengthening transparency of competition law and practices to help the business communities within the APEC region; and

(h) Conducts technical assistance programs annually together with the OECD CLP Division for competition authorities in Southeast Asian countries, to facilitate the development of their own competition culture.

The above illustrates three methods used by the Commission in promoting a competition culture. Still, by the end of August 2001, the Commission has processed a total of 21,584 cases, an indication of the

fruitful results in cultivating the competition culture. The cases consist of 13,839 complaints filed by private parties, 2,017 requests for interpretation of the Law, 5,625 applications for merger approval, and 103 applications for cartel exemption.

4. Conclusion

Following the development of the economy and the transformation of economic structure, the awareness of competition culture and the enforcement of competition law become vital for realising benefits of market economy. To smooth and accelerate the transition, a process of adjusting market players' mentalities and behaviours constitutes what we called building a competition culture.

According to the experience of this Commission, only when the business communities, the government agencies, the academic, and the general public are actively involved, can we make competition law and policy effective. This will in turn benefit those major players from a well-functioned market economy and increase consumer's welfare and economic stability.

The figures provided on the Commissions' enforcement work are a reflection and demonstration of the general public's reliance on the Law and the Commission for a protection of their interests. The experience in building a competition culture has shown to be a positive one. Chinese Taipei will continue to devote its efforts in nurturing this culture.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

26-Sep-2001

English text only

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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CONTRIBUTION FROM THAILAND

This contribution was submitted by Thailand as a background material for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

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COMPETITION LAW AND POLICY IN THAILAND

1. Background

The Thailand Trade Competition Act (hereafter called "the Competition Act") began with the enactment of the Price Fixing and Anti-Monopoly Act of 1979. The 1979 Act consists of two parts. The price fixing part and the anti-monopoly part. The anti-monopoly part of the 1979 Act is aimed at promoting fair competition. It empowers the Central Committee to look after business structures that may create monopoly and conduct restrictive business practices. But since it created problems for enforcement, the Department of Internal Trade, which is in charged of the said Act, made an adjustment to the Act by separating it into 2 Acts : The Price of Goods and Services Act and the Competition Act. The Competition Act came into effect on April 30, 1999.

2. Objective of the Act

Its objective is to promote fair and free trade with competitive environment. Its principle is mainly to look after business operations.

3. Scope of the Act

The Act applies to all types of business operations except those of central, provincial, and local administration; state enterprises under the law on budgetary procedure; group of farmers, co-operatives or co-operative societies recognised by law that their businesses are operated for the benefit of the farmers; and businesses prescribed under the Ministerial Regulation.

4. Enforcement Body

The "Competition Commission" (hereafter called "the Commission") which consists of the Minister of Commerce as Chairman, the Permanent-Secretary of the Ministry of Commerce as Vice-Chairman, the Director-General of the Department of Internal Trade as Member and Secretary, and the Permanent-Secretary of the Ministry of Finance, and no more than twelve other qualified persons as members shall be responsible for the enforcement of the Act. These qualified persons appointed as members must not be political members, holders of political positions, executive members or holders of positions with the responsibilities in the administration of political parties. They shall hold office for a term of two years and not more than two consecutive terms in case they are re-appointed. The Commission shall have the powers and duties to consider complaints, to prescribe rules for dominant position, to consider an application for permission to merge business, or to initiate the joint reduction or restriction of competition to give orders for suspension, cessation, correction, or variation of activities by business operations.

The Office of the Commission was established in the Department of Internal Trade, Ministry of Commerce, with the Director-General of the Department as the Secretary who is responsible for the official affairs of the office.

5. Anti-Competitive Behaviours under the Act

Anti-competitive behaviors under the Act have been defined and divided into categories as followings.

1. Section 25 prohibits business with dominant position and their ability to abuse their market power by :

   1) setting unfair prices for goods and services ;

   2) setting unfair trading conditions, directly or indirectly, to customers in order to restrict customers normal business practices;

   3) limiting supply of goods and services to create a shortage of supply; and

   4) intervening in other business without proper reasons.

   A business operator with market domination is defined under the Competition Act as one or more business operators in the market of any goods or services who have the market share and sales volume above the level that is prescribed by the Commission.

2. Section 26 states that any merger that may create monopolistic power or reduce competition are prohibited, unless the merger get permission from the Commission in the case that it is necessary in the business and beneficial to the economy.

3. Section 27 prohibits a business operator from conspiring, colluding or collaborating with another business operator in order to create monopolistic power, or reduce competition. In the case where it is reasonably necessary in the business and has no serious harm to the economy, the business operators shall submit an application for permission to the Commission. The Commission has already approved forms, rules and procedures to apply for permission of any kinds of anti-competitive agreements.

4. Section 28 of the Act deals with agreements between domestic and oversea business operators performing an activity which will restrict the freedom or opportunity of a person residing in the Kingdom from purchasing goods or services for his/her own use directly from business operators outside the Kingdom.

5. Section 29 of the Act also prohibit a business operator from performing any act which is not free and fair competition and which results in destroying, impairing, obstructing or impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing the cessation of business.

6. Penalties

Failure to abide by the above provisions of the Competition Act could result in jail terms of between one to three years and/or fines ranging from two to six million baht. Note that under the Act, such penalties may be applied not only to the enterprises but also to their managing partner or person in charge of operations unless the offence at stake was committed without his/her knowledge or consent and/or reasonable measures were taken to prevent such offence.

Furthermore, the Act also allows any person suffering damages attributable to violation of Section 25 to 29 to claim for damages by filling a lawsuit through the Consumer Protection Commission.

7. Recent Cases

It has been about 2 years since the enactment of the Competition Act in April 30, 1999. There were many interesting cases come into the Office which can be divided into 3 categories.

1. Cases in which the Commission has made decision

1.1) Tying sale of whisky and beer

Tying sale of whisky and beer by a big brewery producer which occurred at sub-agent and wholesale level. The unreasonably fixing compulsory conditions requiring its customers to restrict purchase of beer by a business operator impeded competition in whisky and beer market. The Commission could not find marked evidence that the said entrepreneur had any anti-competitive behaviors that are in violation of the Competition Act. Then the Commission ordered the Secretariat :

- To inform sub-agents that the tying sales of beer was an inappropriate behavior and may breach the Competition Act so the beer producer should cease that behavior.

- To monitor the movement of whisky and beer producers in particular and report to the Commission periodically.

1.2) Cable Television Monopoly

The merger of the two cable television companies which become the sole business operator in Cable Television Business and gain 100% market share. The merged company raised fee of service packages and reduced the number of programs. The company's reason for doing so is its financial problems due to Baht depreciation and the company is still in loss after the merger.

Since the adjustment of service packages and monthly fee is under the approval of the Mass Communication Organization of Thailand (MCOT) which is the Concession Grantor. The Commission ordered the Secretariat to study the contract between the merged company and MCOT whether the merged company is a state-own enterprise as well as asking MCOT to monitor the company's fee of service packages and the number of packages in order to provide more alternatives to consumers. In this case, if the operation of the merged company is that of a state-own enterprise, it will be excepted according to the Competition Act.

2. Cases that are terminated due to a mutually acceptable settlement of the dispute

2.1) A non-competitive clause in a re-new international franchise agreement between a franchiser and a particular franchisee of a famous fast food restaurant business in Thailand. The terms and conditions of the domestic form are different from those of international form. The franchisee claimed that the franchiser's use of different forms for domestic and international franchisees constitutes discrimination which may violate the Competition Act. Eventually, both parties had jointly agreed on mutually acceptable settlement of their dispute for their own benefit.

2.2) A sole licensed importer of video movies in Thailand was forced by a videotape-rental franchisee not to sell video movies to a particular videotape-rental company. This caused the company to be unable to provide video movies to its customers and its revenue decreased by a

significant amount each month. The case is terminated because the company is out of business for some reason.

2.3) A concerted action between the nation's largest producer and supplier of day-old chicks, live birds, and fresh chicken eggs and its affiliated companies to determine the quantity of production and distribution of the said products. They also fixed compulsory conditions to small producers to buy livestock feed together with live birds or day-old chicks as well as controlled selling price of fresh chicken eggs below market price. Finally, both parties had jointly agreed on mutually acceptable settlement of their dispute.

3. Cases that are in process

3.1) Tying sale of drinking water, white whisky and beer occurred at sub-agent level. This means wholesalers have to buy white whisky together with beer or drinking water from sub-agent whereas retailers are able to buy separately and buy drinking water at low price. This causes retailers to prefer this particular brand of drinking water due to its low price compared to others. This is an anti-competitive behaviour and may restrict competition in drinking water market.

3.2) An anti-competitive behaviour of a big importer of scrubbing patches. The company has market power in the scrubbing patch market. It sold the imported product at a very low price together with a give-away but this was done in a short time. However, this created barrier to entry for other proposed competitors and may violate the Competition Act.

8. Related Problems

The Competition Act is a new act to control unfair trade practices that may result in monopoly or restrictive competition in relevant market. In this regard, we realised that the effective implementation and vigorous enforcement of this law is critical. However, there are some obstacles to reach the objectives.

1. Unfamiliarity with the Act

Since the Act is quite a new law in Thailand, it caused difficulties, in the very first year, for operational staffs to have a deep understanding about the context of Act. However, the Department of Internal Trade is well realised this problem and provides several training and seminars for them.

2. Misunderstanding of the Act

In order for the Act to be fully effective, it is necessary for related parties to have the same understanding about the Act, thus public dissemination is required. This can be done by a series of public information-education seminars, workshops and conferences for the general public, leading government authorities, representatives of the main business association and leading legal-economic professional communities in the capital and major regional center. Eventually, it will result in voluntary compliance of the Act.

9. Conclusion

The Competition Act is an important economic law to monitor business practices. It is believed that fair competition will bring about the development in production and economy as a whole. It is impossible to say that no problems will arise on the implementation of the Competition Act. We have to accept any problem that may incur and do our best for that.

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COMPETITION LAW AND POLICY IN UKRAINE
2000

Ukraine is a country which has nearly a ten year experience in the application of general competition laws.

In Ukraine the first general competition law, namely the Law of Ukraine "On the Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities," was adopted on 18 February 1992. At present the system of competition laws of Ukraine, including the basic general competition laws, namely the Laws of Ukraine "On the Antimonopoly Committee of Ukraine" and "On the Protection Against Unfair Competition" which have been adopted later, and legal acts which regulate relations in particular spheres of economic activities and contain antimonopoly (procompetitive) norms, consists of over a thousand normative and legal acts, including more than 80 laws of Ukraine. The duty of the state to protect competition in entrepreneurial activities is fixed at the level of the Constitution of Ukraine.

A need to renew national laws cardinally for the purpose of bringing them to conformity with new economic realities and harmonising them with modern European and world laws came into being at the end of 1990s. Amendments to the Law of Ukraine "On the Antimonopoly Committee of Ukraine," which were adopted in 2000, have regulated the procedure of appointing the Chairman and other members of the Committee together with the procedure of relieving them of their posts, have strengthened the legal and organisation basis for the Committee's activities, have provided a firmer guarantee of the Committee's independence. The Draft Law of Ukraine "On Amending Certain Legal Acts of Ukraine," which provides for the establishment of a uniform procedure of considering cases concerning violations of competition laws and the establishment of a uniform responsibility to be borne by both legal and natural persons, has been considered by the Supreme Rada (Parliament) of Ukraine. In addition, this draft law provides for the enforcement of such a responsibility for the dissemination of deceitful information that is equal to the responsibility for unfair competition.

The Law of Ukraine "On the Protection of Economic Competition," which was adopted on 11 January 2001 and which will come into force on 27 February 2002, replacing the Law of Ukraine "On the Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities," is the core of the renewed system of competition laws of Ukraine.

This law combines such tested norms of current laws that have been improved due to both the Committee's experience in their application and world practice with an effective legal regulation of matters of economic concentration; the law includes the most important procedural provisions of the Committee's activities.

The system of institution support to the implementation of competition policy in Ukraine provides for the participation of all central and local bodies of executive power, which have functions of management in the sphere of economic circulation, in the formation and implementation of antimonopoly policy being an element of competition policy, both as a whole and according to particular directions. At the same time a special body of executive power whose goal is to ensure the state protection of competition in entrepreneurial activities, namely the Antimonopoly Committee of Ukraine, has been established.

The exercising of state control over the observance of antimonopoly laws, the prevention, detection, and termination of violations of antimonopoly laws are the basic tasks of the Committee.

For the recent years stabilisation in the number of that sort of violations has taken place (there were 1,711 detected and terminated violations in 1998 as against 1,587 in 1999 and 1,595 in 2000). In

2000 the preventive aspect of activities of the Committee's bodies was strengthened, which was reflected in the increase in the number of actions which were committed by economic entities, bodies of state power, bodies of local self-government and bodies of administrative and economic management and control and which were terminated as a result of the Committee's officials' having made recommendations to take measures to prevent violations of antimonopoly laws.

The structure of detected and terminated violations of antimonopoly laws has been stable for the recent years. Abuses of a monopoly position constitute the largest group of that sort of violations (for example, in 2000 the Committee's bodies terminated 721 violations of that sort).

Violations in the sphere of prices, namely setting discriminatory and monopoly high prices (tariffs) for products (work, services), accounted for the largest part (60.7%) of the total number of detected and terminated abuses of a monopoly position. Violations of that sort were detected and terminated by the Committee's bodies on the bulk of investigated product markets, most frequently on markets of housing and communal services (those of centralised supply of heat and water, centralised sewerage, processing hard domestic waste materials, maintenance of housing resources and ordinary repairs to them), on markets of rendering complex services in the sphere of both providing places for trading in food-staffs (non-food-staffs) on markets and guarding. The Committee's bodies terminated a significant number of violations of antimonopoly laws in the form of establishing monopoly high prices on markets of rendering such services that are associated with the performance of functions of the state.

The present state of the economy of Ukraine has the following peculiarity: tariffs for the bulk of services rendered by subjects of natural monopolies are regulated by the state and, consequently, control over the observance of the requirements for the formation, establishment, and application of prices and tariffs of that sort is beyond the competence of the Antimonopoly Committee. That is why measures to prevent duplicating functions in the sphere of exercising control over the observance of both requirements fixed in competition laws and state price discipline have been taken.

In 2000 the Committee's bodies detected and terminated a number of abuses of a monopoly position in which the establishment of discriminatory or monopoly high prices was combined with the imposition of such contractual conditions that created a disadvantage for contractors or with the imposition of such additional conditions that had nothing in common with the subject of the contract. Violations of that sort took place, in particular, on markets of the advance sale of railway tickets, on markets of rendering specialised services by sea ports, on markets of receiving and servicing motor transport in the area of customs inspection.

Abuses of a monopoly position in the form of imposing such contractual conditions or such additional conditions that had nothing in common with the subject of the contract were detected and terminated by the Committee's bodies on markets where the agricultural and industrial complex operates, on markets of gas and electric power supply, on markets of housing and communal services, transport, communication, on markets of the organisation of land exploitation, on markets of sanitary, hygienic and laboratory researches, on markets of rendering ecological services.

In 2000 the Committee's bodies detected and terminated 49 abuses of a monopoly position in the form of such limitation or stoppage of the production of products that resulted or could result in the creation or maintenance of a deficit on the market or in setting monopoly prices and in the form of such partial or complete refusal to sell or purchase a product in the absence of alternative purchase or sales sources that resulted or could result in the creation or maintenance of a deficit on the market or in setting monopoly prices. Violations of that sort were detected and terminated on markets of communication, electric power supply, housing and communal services and transport. At the same time there is a tendency which is characterised by the fact that the purpose of actions of that sort is to compel contractors of monopoly formations to fulfil certain obligations which are unlawful or disputable. In any case that sort of

measures to compel contractors to fulfil the above obligations would be impossible if there had been competition on the market.

The number of detected and terminated violations in the form of such actions that resulted or could result in the creation of barriers to the entry into (withdrawal from) the market with respect to other economic entities was low (32 violations). Violations of that sort were detected predominantly on markets of communication, gas and electric power supply, housing and communal services, and on markets of undertakers' services.

The number of detected and terminated violations of antimonopoly laws in the form of anticompetitive concerted actions, though it increased in 2000 in comparison with the number for the previous year, remains comparatively insignificant (44 violations).

Actions that resulted or could result in setting (maintaining) monopoly prices (tariffs), discounts, additional charges (extra payments), increases in prices constituted the largest group of violations of that sort.

Anticompetitive concerted actions of that sort were detected and terminated on markets of rendering services in the sphere of providing places for trading in food-stuffs and industrial products, on markets of rendering services that are associated with the performance of functions of the state, services in the sphere of compulsory preventive narcological examination, services associated with the preparation of documents for the privatisation of dwellings, on certain markets where the agricultural and industrial complex operates, on markets of servicing electronic cash-machines. Certain entrepreneurs that operate in the Donetsk and Kherson regions on markets of servicing electronic cash-machines, having terminated that sort of violations, began to apply prices lower than those set by their competitors.

Anticompetitive concerted actions which resulted or could result in the distribution of markets on the principle of territory, according to the volume of product sale or according to the circle of consumers were detected and terminated on regional markets where some offices and organisations which have certain administrative powers, concertedly with some economic entities, applied the powers to distribute markets.

The basic cause of a small number of such violations in the form of anticompetitive concerted actions that were detected and terminated by the Committee's bodies consists, on the one hand, in the imperfection of the legal basis, in particular in the fact that laws do not provide for many actions which take place in practice, and, on the other hand, in the insufficiency of the Committee's powers to collect evidence. The entry into force of the Law of Ukraine "On the Protection of Economic Competition" will make it possible to resolve these problems to a great extant.

The number of violations of antimonopoly laws in the form of discrimination practised by bodies of state power, bodies of local self-government, bodies of administrative and economic management and control against economic entities remained significant. In 2000 the Committee's bodies detected and terminated 448 violations of that sort as against 399 in 1999. Violations in the form of restricting the rights of economic entities to purchase and sell products and those in the form of establishing prohibitions or restrictions with respect to certain economic entities or groups of economic entities account for nearly half the total number of violations in the form of discrimination practised against economic entities. As a result of the termination of these violations the above economic entities were relieved from the fulfilment of numerous unlawful requirements that impeded their economic activities. For example, unlawful restrictions of economic activities on markets of agricultural products, in particular on markets of grain, were terminated and prohibitions and restrictions concerning trade activities and activities associated with collecting scrap metal were repealed due to actions of the Committee's bodies.

In 2000 the Committee's bodies detected and terminated 91 violations in the form of giving particular economic entities such tax and other privileges that place them in a privileged position with respect to other economic entities, which resulted or could result in the monopolisation of the market of a certain product. The bulk of violations of that sort were detected and terminated on markets of rendering transport and insurance services.

Sixty-three violations in the form of compelling economic entities to practice a priority conclusion of contracts and to provide a primary supply to a particular circle of consumers, in particular on markets where the agricultural and industrial complex operates, on markets of insurance services, on markets of the organisation of land exploitation, on markets of rendering ecological services, sanitary and epidemiological services, were terminated in 2000. For example, some regional departments of ecological security and some regional sanitary and epidemiological services, using the combination of their power and economic functions, compelled economic entities to conclude contracts with them (departments and services) as with economic entities for services requiring payment.

Thirty-eight violations in the form of prohibiting against the establishment of new enterprises or other organisation forms of entrepreneurship in any sphere of activities and in the form of establishing such limitations with respect to certain types of activities that resulted or could result in the restriction of competition were detected and terminated in 2000. In particular, groundless refusals to give permissions to private entrepreneurs for establishing trade units, for establishing places of accept of scrap ferrous and non-ferrous metal, for concluding contracts for rendering undertakers' services were removed and unlawful restrictions with respect to rendering everyday services to the population, those with respect to repairing and servicing vehicles, restrictions concerning the independent organisation of land exploitation were repealed.

A significant number of violations in the form of establishing prohibitions against selling products from one region of the republic into another and those in the form of making decisions on the centralised distribution of products which resulted or could result in a monopoly position on the market were detected and terminated on markets where the agricultural and industrial complex operates.

In 2000 the Committee's bodies terminated 79 violations of antimonopoly laws in the form of unfair competition. A relatively small number of terminated violations of that sort was caused by the fact that cases of the mentioned category, in accordance with laws of Ukraine, are considered on the bases of applications to be submitted by entrepreneurs. The number of that sort of applications, however, is small, which is associated first of all with the insufficient level of law knowledge of entrepreneurs of the possibility of applying antimonopoly laws to unfair actions of their competitors. At the same time entrepreneurs independently begin to use antimonopoly laws in conflict situations and during talks and begin to apply directly to courts.

The most widespread violations in the form of unfair competition were associated, first, with actions in the sphere of the unlawful use of the business reputation of an economic entity (49.4% of the total number) and, second, with creating barriers to economic entities in the course of competition and gaining an unlawful advantage in competition (44.3% of that sort of violations).

In addition to customary powers of bodies of that sort, the Committee has such rights that enable it to facilitate the development of competition in all spheres of the economy on a complex basis. For this purpose the Committee gives its conclusions with respect to the privatisation of monopoly formations, approving the relevant privatisation documents only if there is no need to take demonopolisation measures, and watches closely that the administrative regulation of prices for products (work, services) of monopoly formations be introduced only on those markets where competition, at least imperfect, is not possible in a medium-term future. In 2000 the state regulation of prices and tariffs was repealed on the initiative of the Committee's bodies with respect to 75 economic entities operating on 22 relevant product markets.

The general peculiarities of privatisation processes in Ukraine caused the decrease in the number of privatisation documents considered by the Committee's bodies in comparison with the respective number for the previous year, namely 249 in 2000 as against 307 in 1999. At the same time the significance of work associated with the consideration of privatisation documents of enterprises being of strategic importance to the economy and security of the state and those of economic entities occupying a monopoly position on national markets increased. The establishment of clear-cut requirements with respect to coming to an agreement about both privatisation procedures and the procedure of getting the Committee's consent to the purchase of blocks of stock of enterprises being privatised made the unlawful monopolisation in the course of privatisation practically impossible.

In 2000 the Committee's bodies considered 697 applications for giving its consent to economic concentration. In 436 cases it gave its consent to economic concentration, whereas in 3 cases it refused to give that sort of consent.

The restriction of competition on national markets of beer and cement and the monopolisation of regional markets of rendering services in the sphere of processing agricultural products in the Kharkiv region (the restriction and the monopolisation being particular examples) were prevented due to measures taken by the Committee's bodies. It is important from the methodological point of view that in 2000 mechanisms of taking into account, in the course of giving the Committee's consent to economic concentration, financial support to be given by third parties were worked out.

The improvement in mechanisms of exercising control over economic concentration has resulted in the acceleration of the legalisation of control relations between economic entities. This not only ensures the effective prevention of the monopolisation of product markets, but also, increasing the transparency of powerful industrial and financial groups, strengthens their responsibility to the society. In 2000 a significant part of potential buyers in advance submitted applications to the Committee for giving its consent to economic concentration together with all necessary information. It is worth mentioning that foreign companies more actively participated in economic concentration in Ukraine in 2000: nearly 60% of considered applications for giving the Committee's consent to economic concentration had been submitted by foreign economic entities.

The Committee's participation in the development of legal norms by making conclusions, remarks and proposals concerning such drafts for laws, decisions of the President of Ukraine and the Cabinet of Ministers of Ukraine that are developed by other bodies and by developing drafts for the relevant decisions on its own initiative is an important direction of its work. In 2000 the Committee's bodies processed 640 drafts for legislative and other normative acts together with 1,261 drafts for decisions of central and local bodies of state power, bodies of local self-government, bodies of administrative and economic management and control. This made it possible, first, to prevent making nearly 660 decisions which could result in the restriction or distortion of competition or would not ensure the protection of the rights of contractors of monopoly formations and, second, to amend nearly 200 normative acts to include procompetitive norms.

Changes in the nature of competition policy have taken place recently, with the basic features of the system of institution and organisation support to the implementation of competition policy being preserved. In particular, the Law of Ukraine "On Natural Monopolies" was adopted on 20 April 2000, it has established the legal basis for the creation of a system of a non-departmental state regulation in the sphere of natural monopolies.

The implementation of the Decree of the President of Ukraine "On the Basic Directions of Competition Policy for 1999-2000 and on Measures to Implement Them" has been completed, a draft decree on the basic directions of competition policy for 2001-2004 has been developed. The draft decree provides for specific measures directed towards the improvement of competition rules, the creation of an effective competitive environment, the reduction of the share of the monopoly sector in the economy of

Ukraine, the optimisation of activities of the state being a direct participant in market relations, the completion of the introduction of laws on natural monopolies, the development of laws on the protection of economic competition and on the institution support to be given to the implementation of competition policy.

According to the draft decree, the regulation of a mechanism of rendering and using state aid will be an important direction of the improvement of rules of competition in Ukraine. In this connection a draft for the special Law of Ukraine "On State Aid" has been developed. The regulation of state aid will make it possible to ensure equal conditions of competition on external markets to national producers of goods, in particular it will make it possible to prevent their removal from those markets as a result of the application of antidumping procedures by other countries.

In order to optimise activities of the state being a direct participant in market relations, the draft law provides for, in particular, a clear-cut delimitation of management functions and economic activities of state bodies, the definition of the necessary and advisable volume of economic activities of bodies of executive power, the prevention of the establishment of restrictions during economic activities by state bodies with respect to economic entities which are real or potential competitors.

The basic ways of lessening the market share of the monopoly sector are as follows: first, the maximally-possible removing of barriers placed to the entry of new economic entities into monopolised product markets together with encouragement to be given to that sort of entry; second, ensuring the development of competitive sectors of the economy at an outstripping pace in comparison with the development of monopolised sectors. The latter is directly linked with improvements in competition rules. The basic task, however, is not only to attain a formally-competitive structure of markets, but also to create an effectively-competitive environment which could ensure a steady development of a socially oriented economy.

In 2000 the Committee substantially strengthened its work in the sphere of international co-operation. A treaty of co-operation in the development of competition was signed between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation in 2000 in addition to seven interdepartmental bilateral agreements in which the Committee has been taking part. The treaty contains a modern procedure of specific interaction between bodies of power and government of Ukraine, on the one hand, and those of Russia, on the other hand, in the application of national antimonopoly laws, the co-ordination of common actions to prevent, limit, and terminate anticompetitive activities of economic entities, the overcoming of negative consequences resulting from that sort of activities or from the meddling of governmental bodies in economic activities of partner countries if the consequences infringe important interests of the relevant parties and have a negative impact on their trade relations.

In January 2000 the Treaty of Concerted Antimonopoly Policy of Countries of the Commonwealth of Independent States (CIS) in a new wording was signed, which signifies a qualitatively new stage of the development of co-operation on the basis of the priority of national laws.

The Antimonopoly Committee of Ukraine, due to the organisation and financial support provided by the United Nations Conference on Trade and Development (UNCTAD) together with the European Commission, held the Regional Conference on Competition Policy of the CIS Countries and Countries of Central and Eastern Europe in Kyiv on 13-14 July 2000.

The conference has adopted the Kyiv declaration of representatives of the region comprising the CIS countries and countries of Eastern and Central Europe which is addressed to the Fourth Review UNCTAD Conference and which stresses the importance and urgency of the creation and development of effective international instruments to protect competition during the further liberalisation of international trade.

The Committee, when performing its international activities, pays meticulous attention to its interaction with international organisations which deal with the development and protection of competition. The co-operation between the Antimonopoly Committee and the Organisation for Economic Co-operation and Development (OECD) makes it possible for the Committee to familiarise itself with experience in the application of competition laws in different countries of the world and to exchange opinions on principles and criteria of the introduction of competition laws.

The Committee takes part in activities of the Interstate Council on Antimonopoly Policy of the CIS Countries which has a considerable impact on the formation of relations of fair competition between economic entities of the CIS countries.

An agreement-free co-operation which provides for participation in conferences, seminars, bilateral and multilateral consultations, in particular those concerning specific matters of case investigations, etc, has been broadening.

DESCRIPTIONS OF CASES

1. Case Concerning the Committee's Giving Its Consent to the Purchase of Blocks of Shares in the Public Companies *Pyvzavod "Rogan"* and *Oleksandriisky Pyvzavod* by the Company *Interbrew Rgn Holding B. V.*

The Company *Interbrew RGN Holding B. V.* (the Netherlands) applied to the Antimonopoly Committee of Ukraine for giving its consent to, first, the direct purchase of such a block of shares in the Public Company *Pyvzavod "Rogan"* (the city of Kharkiv) that would enable the Dutch company to have over 81% of the voices at the high body of management of the emitter and, second, the indirect purchase of such a block of shares in the Public Company *Oleksandriisky Pyvzavod* (the city of Oleksandriya, the Kirovograd region) being under the control of the Public Company *Pyvzavod "Rogan"* that would enable the Dutch company to have over 63% of the voices at the high body of management of the emitter.

The Committee, proceeding from a preliminary analysis of markets, found out that the Public Company *Pyvzavod "Rogan"* and the Public Company *Oleksandriisky Pyvzavod* operated on national markets of beer and non-alcoholic refreshing drinks where they did not occupy monopoly position which, in accordance with Ukrainian laws, is considered to exist if a share in a certain product market exceeds 35 %.

As the applicant had informed, the shares in the Public Company *Pyvzavod "Rogan"* were to be purchased in order to make strategic investments in the technical reequipment of the brewery, to shift to the world quality standards and production systems, to broaden the range of brands of the brewery products, to produce certain brands of beer of the Company *Interbrew RGN Holding B. V.* (Jersey, the Norman Isles), a world-known brewery and the parent company of the Company *Interbrew RGN,* to implement export programme, to build and to put into operation a plant for the production of malt, and to grow high-quality brewer's barley in Ukraine.

At the moment of the submission of the above application the Company *Interbrew RGN Holding B. V.*, however, through its subsidiaries had control over the following Ukrainian breweries: the Public Closed Company *Chernigivsky Pyvzavod "Desna"* (the city of Chernigiv), the Public Company *Mykolaivsky Pyvzavod "Yantar"* (the city of Mykolaiv), and the Public Company *Pyvobezalkogolny Kombinat "Krym"* (the city of Simferopol) whose joint share in the Ukrainian beer market was over 20%. This fact did not make it possible to conclude that the purchase of the shares in the Public Company *Pyvzavod "Rogan"* and the Public Company *Oleksandriisky Pyvzavod* would not result in the establishment

of such a monopoly formation on the mentioned market that would comprise economic entities which were linked by relations of control and whose links would be more stronger as a result of the concentration.

In cases of that sort, as the normative document, namely the "Statute of Exercising Control over Economic Concentration" which was approved by the order of the Antimonopoly Committee of Ukraine and registered by the Ministry of Justice of Ukraine, provides for, in order to conduct a more detailed research in the state of the market and consequences of the concentration for competition on the market, a decision to begin the consideration of a case concerning economic concentration is to be made. The relevant decision was made.

In order to define the joint market share of the group of economic entities which were linked with the Company *SUN Interbrew Limited* (hereinafter referred to as "the Group") by relations of control and whose links would be stronger if the Committee gave its consent to the concentration, the effective statistical reports on beer output, its exports and imports and information on the state of the market were received from bodies of state power, economic entities, consumers, etc. in the course of the case consideration.

As a result of an analysis of the received materials, it was found out that in 1999 the joint share of the Group in the national market of beer was over 35%. The level of the market concentration was characterised by such physical indices that made it possible to consider the market of beer to be moderately concentrated or potentially competitive, whereas after the concentration analogous indices would make it possible to consider the market of beer to be highly concentrated while the high concentration would result in significant restrictions of competition.

Thus, as a result of the preliminary case consideration, it was concluded that the purchase of the shares would result in the establishment of a monopoly formation on the national market of beer. At the same time, the applicant did not submit official decisions to confirm the declared purpose of the concentration, in particular decisions to build and to put into operation the plant for the production of malt, decisions to implement the programme of growing high-quality brewer's barley in Ukraine, and in this connection the advantages of a positive effect of the concentration for public interests over negative consequences for competition were not considered to be permanent.

Having taken into account the above information, officials of the Antimonopoly Committee of Ukraine, in their conclusion concerning preliminary results of the case consideration, proposed the Committee to refuse to give its consent to the purchase of the shares in the Public Company *Pyvzavod "Rogan"* and the Public Company *Oleksandriisky Pyvzavod* by the Company *Interbrew RGN Holding B. V.* in accordance with the proposed conditions.

Having received the above conclusion, the applicant sent a memorandum to the Committee, in which it informed that in case of the Committee's consent to the purchase of the shares in the Public Company *Pyvzavod "Rogan"* the Company *SUN Interbrew Limited* would sell its block of shares in the Public Company *Pyvobezalkogolny Kombinat "Krym."*

The Committee received a certified extract from a legalised written decision of directors of the Company *SUN Interbrew Limited* which provides for that the company, acting on its behalf and on behalf of its subsidiaries, pledged, on condition that the Committee's consent was received, to alienate, from the moment when 50% of shares in the Public Company *Pyvzavod "Rogan"* were purchased and not later than 31 December 2001, any rights for such shares in the Public Company *Pyvobezalkogolny Kombinat "Krym"* that are directly or indirectly owned by the Company *SUN Interbrew Limited* and, from the moment when control over the Public Company *Pyvzavod "Rogan"* was established or from the moment when more than 25% of its shares were purchased, not to exercise the rights of the owner of shares in the Public Company *Pyvobezalkogolny Kombinat "Krym"* for defining its behaviour in competition on the markets and to exercise the rights exclusively for preparing those shares for sale (alienation).

The Company *SUN Interbrew Limited* pledged to return (sell, alienate, etc.) all the shares in the Public Company *Pyvzavod "Rogan"* purchased in accordance with terms and conditions of the relevant sale contract to their former owners if the purchase of shares in the amount ensuring 50% of the votes at the high management body of the Public Company *Pyvzavod "Rogan"* was not completed within a calendar year from the date of the Committee's giving its consent. The possibility of events of that sort was provided for by the above sale contract.

The joint share of the Group (without the share of the Public Company *Pyvobezalkogolny Kombinat "Krym"*) in the national market of beer was less than 35% in 1999. If shares of the Public Company *Pyvzavod "Rogan"* are purchased and if shares of the Public Company *Pyvobezalkogolny Kombinat "Krym"* are sold, the concentration level of the beer market will be higher than that before the purchase, at the same time physical indexes which characterise the concentration level will be within such limits that make it possible to consider the beer market to be moderately concentrated or potentially competitive.

In addition, in the course of the case consideration the Kharkiv Regional State Administration and the Company *SUN Interbrew Limited* held relevant meetings which resulted in signing an official agreement, first, on the participation of the latter in the implementation of the project to construct and put into operation the plant for the production of malt and, second, on the initiation of such a broadened programme of development that provides for making investments in the growth of high-quality brewer's barley in Ukraine, which must have positive effects on the brewer's industry of Ukraine at least because in the course of the intensified production and consumption of beer Ukrainian malt-producing plants, the bulk of which are obsolete, will not be able to ensure the production of malt in necessary quantities. The above arguments changed the initial position of the Kharkiv Regional State Administration on the purchase of shares in the Public Company *Pyvzavod "Rogan"* by the Company *SUN Interbrew Limited* for the opposite position.

Thus the implementation of the announced purchase of the blocks of shares in the Public Company *Pyvzavod "Rogan"* and the Public Company *Oleksandriisky Pyvzavod* by the Company *SUN Interbrew Limited* will not result in the establishment of the monopoly formation on the national market of beer if the Company *SUN Interbrew Limited* fulfils its pledges to alienate any rights concerning all shares in the Public Company *Pyvobezalkogolny Kombinat "Krym"* and if it does not use rights of the owner of those shares for defining the behaviour of the Public Company *Pyvobezalkogolny Kombinat "Krym"* in competition on markets, which actually excludes the possibility of exercising simultaneous control over activities of the Public Company *Pyvzavod "Rogan,"* the Public Company *Oleksandriisky Pyvzavod,* and the Public Company *Pyvobezalkogolny Kombinat "Krym"* by the Company *SUN Interbrew Limited*.

The Committee gave its consent to the direct purchase of the block of shares in the Public Company *Pyvzavod "Rogan"* and to the indirect purchase of the block of shares in the Public Company *Oleksandriisky Pyvzavod* by the Company *SUN Interbrew Limited* and obliged the Company *SUN Interbrew Limited* to fulfil the pledges provided for by the legalised written decision of directors of the Company *SUN Interbrew Limited*.

At the same time, the Committee took into account information of the Company *SUN Interbrew Limited* on the possible return of the purchased shares to their former owners and absolved the company from the pledge to sell shares in the Public Company *Pyvobezalkogolny Kombinat "Krym"* if that sort of return did not take place.

The Company *SUN Interbrew Limited* made concrete steps towards the fulfilment of obligations which had arisen in connection with the above concentration, in particular the Companies *CA ²B Investment Bank* and CA ²B *Security (Ukraine) ÀÒ* were set to be financial advisers to the Company

SUN Interbrew Limited on the preparation and implementation of the alienation, by 31 December 2001, of the whole block of shares in the Public Company *Pyvobezalkogolny Kombinat "Krym."*

According to the information submitted by the Company CA *²B Security (Ukraine) ÀÒ* in April 2001 information about the sale of a block of shares in the Public Company *Pyvobezalkogolny Kombinat "Krym"* was sent to potential buyers (nearly 60 companies). Companies which had expressed their intention to purchase the mentioned block of shares were familiarised with technical, financial, and other data concerning the Public Company *Pyvobezalkogolny Kombinat "Krym."* Later companies which had reiterated their interest in the purchase of shares in the Public Company *Pyvobezalkogolny Kombinat "Krym"* were allowed by the seller to make a detailed analysis of activities of the enterprise, including an analysis to be made due to visits to the enterprise.

2. Case Concerning the Committee's Giving Its Consent to the Purchase of Blocks of Shares in the Public Companies *Kirovogradoblenergo, Power Company "Sevastopolenergo,"* and *Khersonoblenergo* by the Company *Chodoslovenske Energeticke Zavody*

The Antimonopoly Committee of Ukraine considered applications submitted by the Company VY *Chodoslovenske Energeticke Zavody* (hereinafter referred to as "the Purchaser") (the city of Kosice, Slovakia) for giving its consent to the direct purchase of blocks of shares in the Public Companies *Kirovogradoblenergo, Power Company "Sevastopolenergo,"* and *Khersonoblenergo* in the course of the privatisation of these companies.

According to information given by the Purchaser, it has no direct or indirect links in the form of relations of control with any economic entities, with the exception of the Public Company *Zhytomyroblenergo* whose block of shares it had purchased earlier.

The regional power companies whose blocks of shares are the object of the purchase, operate, first, on local relevant markets of electric power where they use local power networks and occupy a monopoly position on those markets as subjects of natural monopoly and, second, on the national market of electric power in which they, using a regulated tariff, have such an insignificant total share that does not make it possible to occupy a monopoly position either jointly or individually.

An analysis of the amount of the assets and sales of the Purchaser, which was made in the course of the consideration of the application, was indicative of the fact that the Purchaser's own financial resources were not enough for the purchase of the mentioned block of shares and that they could be purchased only with the use of attracted financial resources. At the Committee's request the Purchaser informed that financial assistance was given by the Ukrainian Energetic Partnership (Wilmington, Delaware, USA).

An analysis of conditions of rendering the financial assistance showed that the conditions did not provide for the transfer of control over economic activities of the mentioned regional electric power companies from the Purchaser to third parties.

Consequently, these purchases will not result in significant changes in markets of services in the sphere of supplying electric power at a regulated tariff and transmitting electric power through local power networks where the mentioned public companies operate and will not result in the restriction of competition on other product markets.

The Committee, taking into account the above information, gave its consent to the purchase of blocks of shares in the Public Companies *Kirovogradoblenergo, Power Company "Sevastopolenergo,"* and *Khersonoblenergo* by the Company *Chodoslovenske Energeticke Zavody*.

3. Anticompetitive Concerted Actions Committed by the Private Enterprise *Zovnishnio-Torgivelna Firma "Prommasheksport"* and the Limited-Liability Company *Gepard*

In Ukraine a monopoly position on the national market of concentrated kaolin is occupied by the Public Company *Prosianskyi Girnycho-Zbagachuvalnyi Kombinat* (hereinafter referred to as "the Integrated Plant").

In December 2000 the Integrated Plant jointly with the Limited-Liability Company *Gepard* (hereinafter referred to as "the Company *Gepard*") (the city of Dnipropetrovsk), which operates on markets of rendering mediator's services, in particular those rendered in the course of the sale of kaolin, established the Limited-Liability Company *Torgovyi Dim "Prosiana-Kaolin"* (hereinafter referred to as "the Trading House").

After that, at the end of 2000, the Integrated Plant applied to its buyers with the proposal to conclude contracts with the Trading House on the supply of kaolin because, in connection with the reorganisation of the marketing service of the Integrated Plant, all made products would be sold exclusively through the Trading House. The Integrated Plant and the Trading House had concluded a contract on the supply of nearly the whole volume of products planned for 2001 at prices being higher than previous ones by 10 to 20%.

At the end of December 2000 the Private Enterprise *Zovnishnio-Torgivelna Firma "Prommasheksport"* (hereinafter referred to as "the Firm *Prommasheksport*") (the town of Berdychiv, the Zhytomyr region), a competitor of the Company *Gepard* on the market of rendering mediator's services, received a consent of the Antimonopoly Committee of Ukraine to the purchase of such a block of shares that ensures over 25% of voices at high management bodies of the Integrated Plant.

At the same time, the Firm *Prommasheksport* applied to its contractors with the proposal to conclude contracts on the purchase of kaolin produced by the Integrated Plant exclusively from the Firm *Prommasheksport* and the Company *Gepard*.

It was established in the course of the consideration of the case having signs of anticompetitive concerted actions that the Firm *Prommasheksport* and the Company *Gepard* had acted in accordance with a contract concluded on 30 October 2000 on joint activities which provided for, first, the sole strategy with respect to mechanisms and volumes of the sale of kaolin (kaolin products) and, second, coming to an agreement with each other about all the rest of contracts to be concluded by them. When applying to the Antimonopoly Committee of Ukraine, the Firm *Prommasheksport* did not submit information about the existence of contracts which could result in increasing the monopolisation of the market of kaolin despite the fact that the above contract had been concluded and had come into force. Although the contract at the moment of its conclusion could not substantially impact on the state of competition on the market of kaolin, after the establishment of the group of linked economic entities comprising, on the one hand, the participant in the contract on joint activities, namely the Company *Gepard*, and, on the other hand, the entrepreneur occupying a monopoly position on the market of kaolin, namely the Integrated Plant, the implementation of this contract could result and, in fact, resulted in the restriction of competition.

The Committee qualified the above actions of the Firm *Prommasheksport* and the Company *Gepard* in accordance with Paragraphs 2 and 4 of Article 5 of the Law of Ukraine "On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities" as violations of antimonopoly laws in the form of anticompetitive concerted actions to be committed on the basis of a concluded contract on joint activities which could result in setting monopoly prices for kaolin and kaolin products and in the removal of other sellers of kaolin and kaolin products from the market.

In addition, the above actions of the Firm *Prommasheksport* were also qualified in accordance with Paragraph 2 of Part 1 of Article 19 of the mentioned law as violations of antimonopoly laws in the form of the submission of deliberately falsified information to the Antimonopoly Committee of Ukraine.

Fines were imposed on the violators.

The Firm *Prommasheksport* was obliged to cancel such provisions of the contract concluded with the Company *Gepard* on joint activities that provide for the sole strategy with respect to mechanisms and volumes of the sale of kaolin or kaolin products.

The Antimonopoly Committee of Ukraine, by its order, repealed its consent to the purchase of such a block of shares in the Integrated Plant by the Firm *Prommasheksport* that ensured over 25% of voices at high management bodies of the Integrated Plant.

4. Anticompetitive Concerted Actions Committed by the Limited-Liability Companies *Poshuk-Service, Delta-Azov, Interkvant,* and *Interkvant-Service*

Before 1999 on the market of servicing electronic cash-machines in the city of Mariupol (the Donetsk region) there had operated two centres, namely the Limited-Liability Companies *Poshuk-Service* and *Delta-Azov*. The price of their services had been equal to 15 hryvnias. In 1999 the Limited-Liability Company *Interkvant* entered into the market. The price of its service was equal to 10 hryvnias.

As a result of the fact that the price of the service rendered by the Limited-Liability Company *Interkvant*, being of equal quality, was in 1.5 times lower, a part of consumers switched from the Limited-Liability Companies *Poshuk-Service* and *Delta-Azov* to the Limited-Liability Company *Interkvant*.

The Limited-Liability Companies *Poshuk-Service* and *Delta-Azov*, in retaliation, began to exert pressure on the competitor. They, in particular, required from the Limited-Liability Company *Interkvant* to return their customers, required from factories producing electronic cash-machines to terminate their supplying the Limited-Liability Company *Interkvant* with completing and spare parts, the Limited-Liability Company *Delta-Azov* initiated the extraordinary certification of the Limited-Liability Company *Interkvant* by one of the largest producers of electronic cash-machines and managed to force another producer to introduce such changes in its contracts with entrepreneurs servicing its cash-machines that prohibited any switch of customers from this servicing centre to another.

The Limited-Liability Company *Interkvant* under the pressure of the Limited-Liability Companies *Poshuk-Service* and *Delta-Azov* agreed to meet with the management of the latter servicing centres and to discuss matters with respect to raising tariffs for services. In June 1999 the management of the three servicing centres agreed to set the sole tariff for technical services of electronic cash-machines in the amount of 20 hryvnias which, in fact, was introduced by all the participants in the agreement at intervals of a month.

In January 2000 the Limited-Liability Company *Interkvant-Service* instead of the Limited-Liability Company *Interkvant* began to service electronic cash-machines. It continued to maintain the sole tariff set jointly with the Limited-Liability Companies *Poshuk-Service* and *Delta-Azov*.

The participants in the concerted actions substantiated the raise in the tariff by an increase in prices for spare parts and power resources. The relative extant of the increase in the prices for spare parts and power resources, however, was significantly less than the extant of the raise in the tariff for the service. At the same time, different participants in the concerted actions adduced such "increased" prices for the same spare parts bought from the same producers that differed in 1.6 to 1.8 times. Finally, the increase in

the prices for spare parts and power resources took place in November 1998, whereas the tariffs for services raised in July and August 1999.

The fact that the Limited-Liability Company *Delta-Azov* practically stopped its advertising campaign, reducing its advertising expenses in 24 times within four months, after the raise in the tariffs is additional evidence of the termination of competition between the participants in the agreement.

In the course of the consideration of the case concerning violations of antimonopoly laws the management of the Limited-Liability Company *Delta-Azov* denied the fact that the above talks had been conducted and that the sole tariff had been set, but the fact was confirmed by the rest of the participants.

The Donetsk Territorial Office of the Committee qualified the actions of the Limited-Liability Companies *Poshuk-Service*, *Delta-Azov*, *Interkvant*, and *Interkvant-Service* in accordance with Paragraph 2 of Article 5 of the Law of Ukraine "On Limitation of Monopolism and Prevention of Unfair Competition in Entrepreneurial Activities" as such anticompetitive concerted actions that had resulted in setting (maintaining) monopoly prices (tariffs).

Fines were imposed on the violators.

The violations were terminated, the Limited-Liability Company *Interkvant-Service* set a tariff being lower than those set by its competitors.

SOME ASPECTS OF INTERNATIONAL CO-OPERATION IN THE PROTECTION OF ECONOMIC COMPETITION : THE VIEWPOINT OF THE ANTIMONOPOLY COMMITTEE OF UKRAINE

The Antimonopoly Committee of Ukraine since first steps of its activities has considered international co-operation to be an important direction of work. For seven and a half years of the Committee's activities it has concluded seven bilateral interdepartmental agreements on co-operation; the Bilateral Treaty of Co-operation Between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation in the Development of Competition and the Treaty of Concerted Antimonopoly Policy of Countries of the Commonwealth of Independent States (CIS) have been developed with the participation of the Committee. For this period the Committee twice has welcomed participants in international fora on competition policy in Kyiv. The Committee has been co-operating with international organisations which deal with competition matters. In this connection the Committee would like to express its deep gratitude to the Organisation for Economic Co-operation and Development (OECD).

The Law of Ukraine "On the Protection of Economic Competition," whose draft has been developed by the Committee and which has been adopted recently, is based on world experience in the development of competition laws and is harmonised with laws of OECD member countries.

At the same time acquired experience convinces the Committee of the fact that international co-operation in the sphere of competition policy, especially multilateral co-operation, can be effective only if certain specific and stable mechanisms of that sort of co-operation are introduced.

Even today, in the Committee's opinion, there is a number of problems for which the creation of mechanisms of that sort is both possible and advisable.

These problems constitute, in particular, a group of matters associated with the global information support to activities in the protection of economic competition. In the Committee's opinion, three directions are the most important in terms of the future. The first direction is associated with the creation of a bank of data concerning cases of violations of competition law, violators, and sanctions applied against them. It is desirable that the work done by the Forum organisers in the sphere of collecting and processing information about anticartel actions should be considered to be the first step towards the creation of that sort of data bank. The second direction is associated with the creation of an analogous bank of data concerning decisions on matters of economic concentration. The third direction is associated with the creation of a bank of data concerning competition laws and materials with respect their application (in particular, judgements). In this connection the Committee points out that the creation of a bank of data concerning competition laws of CIS member countries has been initiated within activities of the Interstate Council on Antimonopoly Policy. If common consent in principle is achieved, the creation of the above data banks will consist in the definition of mechanisms of accumulating, storing, and renewing relevant information together with mechanisms of getting access to the information.

Another problem, whose solution requires the creation of mechanisms of international co-operation on a multilateral basis, is associated with anticartel measures. Concrete proposals concerning this matter were made, in particular, in the Kyiv Declaration of the Regional Conference on Competition Policy for CIS Member Countries and Countries of Central and Eastern Europe (Kyiv, Ukraine, 13-14 July 2000). They provide for, in particular, initiating the preparation and signing of an international agreement on the mutual recognition of decisions on cartels with a view to simplifying the procedure of fulfilling decisions which concern foreign economic entities; fixing, in official international documents, a provision stating that the establishment of a cartel has or can have an impact on competition in any country where its participants operate; introducing a procedure of notifying for countries which intend to give their consent to the establishment of cartels from among enterprises operating in the territory of more than one country.

The next group of matters, whose solution requires multilateral international co-operation, is the development of a mutually acceptable conception scheme of international rules of competition in the sphere of mergers. At the present stage it is important to study thoroughly remarks which substantiate the prematurity of and barriers to the introduction of that sort of rules and to take into account the remarks later, during the development of that sort of rules in the form of the limitations with respect to the sphere of application and the number of participants or in any other form. In order to ensure the observance of established principles, it is also necessary to provide for, from the outset, mechanisms to settle arising disputes.

Finally, there are problems which are specific for Ukraine and which have an international aspect, namely the development of mechanisms of co-operation between, on the one hand, international organisations comprising countries which have broad experience in the application of competition laws (for example, OECD member countries) and, on the other hand, transition economy countries which are not members of the organisations. The matter concerns, in particular, the insurance of the further harmonisation of competition laws of OECD member countries and those of non-member countries, the creation of special conditions for transition economy countries and developing countries, and technical assistance to be rendered to transition economy countries and developing countries. The Committee, proceeding from previous experience, hopes for OECD assistance in resolving these matters.

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VENEZUELA'S FREE COMPETITION SYSTEM

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VENEZUELA'S FREE COMPETITION SYSTEM

The Free Competition Regime

The free competition regime in Venezuela started in 1992 when the government settled a group of new policies in order to prepare the country to face globalisation process, including to the Law to Promote and Protect the Exercise of Free Competition. The objective of the law is to promote and protect the free competition and the efficiency that benefits the producers and the consumers; and to prohibit monopolistic and oligopolistic practices and other means that could impede, restrict, falsify, or limit the enjoyment of economic freedom. In this sense, the normal subjects of law are natural or juristic persons, public or private, engaged in profitable or non-profitable economic activities within the country, or groups of agents engaged in such activities.

The Venezuelan System of Free Competition prohibits in general all the conducts, practices, agreements, etc. that impede, restrict, falsify or limit the free competition. In particular our legislation prohibits boycotts, cartels and other horizontal agreements, bid —rigging, vertical agreements that contains vertical restraints and the abuse of dominant position. The law has also a prohibition for all the mergers - horizontal, vertical or other-that are restrictive of the market or could generate o reinforce a dominant position in a relevant market. Finally, the law prohibits unfair competition in terms of misleading or false advertising, bribery in commerce, violation of industrial secrets, etc. and other commercial policies, which tend to eliminate competitors.

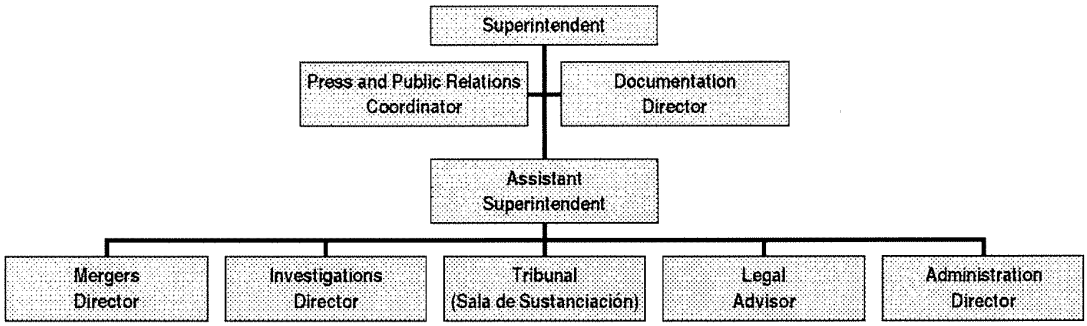
Cartels and bid-rigging, boycotts, abuse of dominant position and unfair competition are *per se* violations of the law. The other anti competitive practices should be analysed by the Office by the rule of reason theory in order to establish if there is or not a violations of the law or if the practice should be authorised by the Office because the efficiency that it provide. In order to develop the case, the Office use the methodology of the relevant market.

In the case of mergers, there are two ways to review them. One is to authorised them (ex ante) and that is voluntary for the parties, that is, the pre merger notification procedure is not obligatory. The other is by an administrative procedure of prosecution of an anti competitive practice, which is ex post and it is to determine if the merger has violate the law, because is anti competitive or restrictive of the competition.

The Competition Office

The law creates the Competition Olfice (Office of the Superintendent For The Promotion And Protection Of Free Competition) which is an independent Office (with operational autonomy), that is attached administratively to the Ministry of Production and Commerce. This Office has the power to investigate the existence of anti competitive practices and to impose fines against persons or firms that act against the law. Some of the powers and duties that the Office has are: to conduct the investigations necessary to verify the existence of anticompetitive practices; and prepare cases files concerning with such practices; to determine the existence or non existence of prohibited practices or conducts; proscribe and

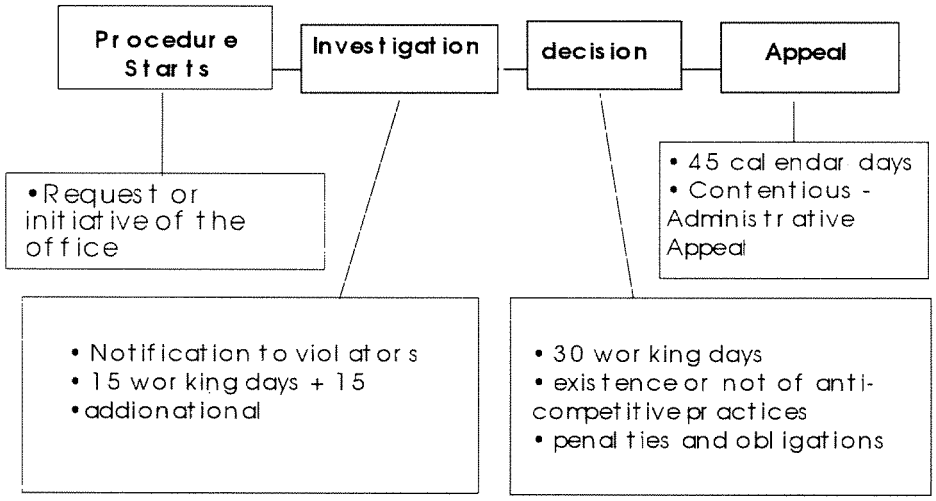
punished them; propose to the Executive Branch the regulations necessary for the application of the law; to issue an opinion on matters within its competence when so requested by the judicial or administrative authorities; etc. A Superintendent, who shall be appointed by the President of the Republic, shall administer the Office. The Superintendent has an Assistant Superintendent who is also appointed by the president. Both will exercise their office for four years and may appointed for other periods. The Superintendent have a Tribunal (named Sala de Sustanciacion) which has powers to: summon any person to appear to testify on pertinent matters; to require a person to present any documents or information that could be related to the alleged violation; to examine ledgers and documents during the investigation; to subpoena a person. through the national press; to appear who may be able to furnish information with respect to the alleged violation; etc. In this sense, all persons and firms conducting business in the country, public or private must furnish the information and documentation required of them by the Office. The information provided is confidential. The Tribunal is under the Assistant Superintendent. The Tribunal, as we call it for translation purpose is substantiation chamber that instruct the files and co-ordinate all the defence and offence argument and proofs in order to give to the Superintendent the must complete file for him to decide.



The Procedure

Regarding to the procedure in case of prohibited practices, they could be initiated by request of a concerned party or at the initiative of the Office. The Superintendent orders the initiation, and he orders the investigation to be held by the Tribunal. Once the case is open, the Tribunal notify the alleged violators that the respective administrative enquiry has been opened, and indicate the violations that being investigated. The parties have fifteen (15) working days period within to present their evidence and put forward their arguments. The period could be extended for fifteen (15) additional days if the tribunal deems it necessary. Once this period of time has elapsed, the Superintendent has thirty (30) working days to issue a decision in which he determine whether the existence or not of anti-competitive practices. The decisions adopted by the Office exhaust the administrative route, and the only remedy that may be undertaken is the Contentious —Administrative appeal within a period of forty — five (45) calendar days since the decision and then it shall be appeal at the Supreme Tribunal of Justice. Persons who are involved in the prohibited practices and conducts may be punished by the Office, with a fine of up to twenty percent (20%) of the value of the violators' sales.

In the case of mergers' authorisation (ex ante) or other practices, and for the resolution of this matters the procedure that apply is the regular one established in the Organic Law of Administrative Proceedings.



The protection of the free competition that is one of the objectives of the law is possible by prosecuting anti competitive practices and punishing them. In other hand the Office has another main activity that is the promotion of the competition. This activity is held by the office among different ways as presentations in academic and business forums, sectorial investigations, public policies analysis and opinions, revision of the laws or projects of new laws that will be approved by the National Conference (Congress), and others.

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

02-Oct-2001

English text only

CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

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CONTRIBUTION FROM ZAMBIA

This contribution was submitted by Zambia as a background material for the first meeting of the Global Forum on Competition to be held on 17 and 18 October 2001.

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CONTRIBUTION FROM ZAMBIA

By Mr George K Lipimile
Zambia Competition Commission

I. – COMPETITION LAW AND POLICY IN ZAMBIA

1. Introduction

The Zambia Competition Commission was established under the Competition and Fair Trading Act, Section 4 of Chapter 417 of the Laws of Zambia to prevent anti-competitive and restrictive business practices and promote consumer welfare. The law came into force in February 1995. Zambia Competition Commission is an autonomous corporate body under the Ministry of Commerce, Trade and Industry. It opened its doors to the public in March 1997. In the enforcement of the Act, the Commission has been guided by two principal aims, thus:

- To prevent anti-competitive conduct thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service; and
- To ensure the interests and welfare of consumers are adequately protected in their dealings with producers and sellers.

2. Objectives of the Act

The aims and objectives of the Act are:

- To encourage competition in the economy;
- To protect consumer welfare;
- To strengthen the efficiency of production and distribution of goods and services;
- To secure the best possible conditions for the freedom of trade; and
- To expand the base of entrepreneurship.

3. Functions of the Commission

- To monitor, control and prohibit conduct likely to adversely affect competition and fair trading in Zambia;
- To prohibit anti-competitive trade practices;
- To regulate monopolies and concentrations of economic power;

- To authorise conducts not prohibited out rightly by the Act;

- To provide information for the guidance of consumers and business persons regarding their rights under the Act;

- To cooperate with and assist any association or body of persons to develop and promote the observance of standards of conduct for the purpose of ensuring compliance with the provisions of the Act.

4. Activities of the Commission relating to Competition Law and Policy

a) During the year 2000, the Commission was very busy attending to various market violations that continued to increase. The globalisation of world trade naturally had an impact on competition in the region general and Zambia in particular. In responding to the globalisation trend, Multinational Corporations in the region and globally were involved in various forms of consolidations in response to increased competition in the regional market.

b) During the year 2000, the Common Market for Eastern and Southern Africa (COMESA) launched its Free Trade Area (FTA). The launch of the COMESA-FTA meant that cross border trade is expected to increase with reduced tariffs among member states. The Southern African Development Community Trade Protocol was being finalised. This means that an FTA would be established among the SADC member states to promote trade and investment. It is obvious that the establishment of the two FTAs in Southern Africa offer great challenges for the competition law and policy in the region.

c) Anticompetitive trade practices perpetuated in other countries had an effect on business in other member states where trade takes place. The need for the regional competition policy aimed at addressing competition concerns in the region does not require being over-emphasised. These regional trends shall be the major challenges of the competition authorities in the region. The Zambia Competition Commission is developing measures with other competition authorities in the region aimed at addressing anticompetitive practices in the region.

d) Over the last three years of the Commission's life, a total of 172 cases were investigated and the Board of Commissioners made decisions in 135 of the cases. The distribution of cases against each section is as given below.

Section	% Proportion	Statistics
Anti-Competitive Practices (Section 7)	30	49
Mergers/Takeovers (Section 8)	39	48
Trade Agreements (Section 9)	11	14
Anti-Competitive Practices by Trade Associations (Section 10)	2	2
Unfair Trading – (Consumer Protection) (Section 12)	18	22
Total	**100**	**135**

e) During 2000 a total of 69 cases were handled with 37 cases carried forward to the year 2001. The year 2000 was a year of merger activity under section 8 of the Act that represented 47% of the cases closed. The second largest area of violations was under Section 7 on anticompetitive practices, which represented 33% of the Commission's work. The summary of statistics for various sections of the Act are as given below:

Section	Number of Cases	% Proportion
Anti-Competitive Practices (Section 7)	15	33
Mergers/Takeovers (Section 8)	22	47
Trade Agreements (Section 9)	1	14
Anti-Competitive Practices by Trade Associations (Section 10)	0	2
Unfair Trading – (Consumer Protection) (Section 12)	8	-
Total	**46**	**100**

II – DESCRIPTION OF CASES

A Cartel Cases

1.0 Exclusive Dealing Arrangements between Hybrid Poultry Farm and Galaunia Farms Limited

1.1 Introduction and Background Information

1.1.1 The case arose from a revelation during a meeting between management of Hybrid Poultry Farm (HPF), Zambia Association of Manufacturers (ZAM) and Zambia Competition Commission (ZCC) that HPF and Galaunia Holdings Limited (GH) had earlier agreed to effect a sale of Mariandale Farm and the poultry processing factory to Galaunia Holdings subject to agreed exclusive dealing clauses and conditions.

1.1.2 In turn ZCC advised the parties to notify the said exclusive agreements as required under the Competition and Fair Trading Act Cap 417 of the Laws of Zambia.

1.1.3 ZCC instituted investigations drawing heavily on the parallel investigations on the intended takeover of Tamba Chicks Ltd. GH management was interviewed on the same.

1.2 Findings

1.2.1 During the investigations it was revealed that in the sale of Mariandale Farm, which specializes in the raising of Day Old Chicks (DOC) into table birds, HPF required GH to only purchase DOC from itself. Further GH was also required to consider HPF's right of first refusal should it intend to resell Mariandale Farm. GH was also not allowed to raise any type of poultry, at the farm, apart from broiler chickens, including the provision not to go into business of a chicken hatchery. The parties also agreed that GH should be accorded the right of first refusal should HPF intend to sell some of its shares and that HPF should be given the first right of refusal to participate in an out growers scheme should GH come up with one.

1.2.2 The ZCC noted that the parties to this transaction are the two leading players in the poultry sector's upstream (HPF) and downstream (GH) sub sectors. HPF is the dominant producer of DOC in Zambia with a 60% market share. GH with its Mariandale and Diamondale Farms has an uptake of 48,000 DOC per week and hence the largest buyer in the poultry sector.

1.2.3 The anti-competitive Clauses in the Sale and Purchase Agreements included among other provisions:

Clause 13: That GFL would not raise any type of poultry on Mariandale Farm other than broiler chickens.

Clause 14: That GFL and any subsidiary or associate company would not enter into the business of a chicken hatchery or breeder broiler production in Zambia.

Clause 15: That GFL would only procure its DOC requirements exclusively from HPF.

Clause 17: That GFL shall have the exclusive right to collect all chicken manure from HPF chicken houses located in the Lusaka/Chisamba area at a cost of US$0.30 per 90kg bag.

Clause 19: That GFL should give HPF the right to first refusal to purchase, within five years of completion date, should it decide to sell the business and vice versa.

Clause 21: Should GFL develop and implement an out-grower scheme to grow broiler chickens, HPF shall be given the first refusal to participate in the scheme.

1.2.4 On the basis of the foregoing findings, it is evident that the parties had contravened the Act.

1.2.5 The exclusive dealing arrangements appear to have been over and above the offers each party made and hence the considerations made by the other.

1.2.6 The excesses hinge on the ulterior motives of the parties in as far as the poultry sector is concerned. The parties seem to have taken advantage of their dominant market positions upstream and downstream – where each party was dominant. The parties were, both by motive and concerted practices, foreclosing competition both in the DOC, table birds (broiler) and frozen chicken.

1.2.7 HPF and GH also entered into another agreement for sale and purchase of the Poultry Processing Company (PPC) with similar restrictive clauses.

1.2.8 These practices are in direct contravention of Section 7 of the Act and have the tenets of distractive cartel behaviour.

1.3 The Board of Commissioners found all the exclusive dealing provisions in the sale and purchase agreements by the parties anti-competitive and nullified them.

2.0 Oil Marketing Cartel

2.1 Introduction and Background Information

2.1.1 The Energy Regulations Board (ERB) is the Sector Regulator for the energy sector in Zambia, which includes petroleum products, electricity, solar energy and other forms of energy.

2.1.2 The Sector regulator has a mechanism through which price adjustment applications are handled. The system is that each Oil Marketing Company (OMC) has to individually apply to ERB expressing the need for a price adjustment and the procedure is documented and each OMC has a written statement from ERB. When ERB is satisfies with the need for a price adjustment (increase) it sets a price cap, which is the upper limit from the existing and ruling price levels being the lower end. The OMC are not allowed to set prices above the price cap.

2.1.3 All OMC buy their petroleum requirements from the Indeni Oil Refinery, which processes imported crude oil through Zambia National Oil Company (ZNOC). ZNOC sells the refined petroleum products on wholesale prices.

2.1.4 In May 1999, the Indeni Oil Refinery was gutted by fire and all Oil Marketing Companies were allowed by Government of the Republic of Zambia to import refined petroleum products. The ERB issued nine (9) OMC with import licenses and government reduced customs duty from 25% to 5%. Despite the various sources of imports, the pump prices of petroleum products remained the same.

2.1.5 When the repair work was completed at Indeni Oil Refinery, the government reinstated the 25% import duty on all petroleum products. The OMC jointly submitted a complaint to ERB on the effects of the government decision on their businesses.

2.2 Nature of the Cartel

2.2.1 The ERB and Zambia Competition Commission observed that Oil Marketing Companies in Zambia acted collectively in price adjustments since 1997.

2.2.2 The Oil Marketing Companies selected one company to apply for a price adjustment to the Sector Regulator and all the parties implement the decision of the Regulator uniformly at the same time.

2.2.3 The Oil Marketing Companies held regular meetings where exchange of information regarding sales volumes and prices take place. These meetings have been taking place for a long time.

2.2.4 Small OMC had attempted to charge lower prices on the basis of the their cost structures, but the cartel leaders immediately reacted by reducing pump prices to lower price levels at all service stations near service stations of defiant operators until they complied with standard behaviour on prices.

2.3 Legal Action

2.3.1 The Zambia Competition Commission working with the ERB have prepared documentation, received minutes of the meetings of the OMC, the nature of shared information with a view to lodge the case with High Court of Zambia for prosecution. Investigations have since been completed.

2.3.2 This is likely to be a landmark case in Zambia concerning cartel behaviour.

B. Takeover Cases

3.0 The Takeover of Chilanga Cement Plc by Lafarge of France.

3.1 Nature of the takeover.

The takeover of Chilanga Cement involved the sale, to Lafarge SA of France 51% shares owned by the Commonwealth Development Corporation (CDC) [through its subsidiary firm, Pan African Cement (PAC)] in the company. The institutions and individuals owned the balance of the shares.

3.2 Issues for consideration.

3.2.1 The primary issue that arose from this takeover was the fact that Chilanga Cement is a monopoly undertaking in Zambia that is, supplying over 50% of the cement consumed domestically. Prior to this transaction, the ZCC had reports suggesting that Chilanga Cement was abusing its dominant position in the market through excessive pricing and market sharing within the PAC cement group of companies. The effect of the market sharing was to prevent Zambian cement from being sold in Burundi, its main market prior to the takeover, which should in turn be supplied from Tanzania.

3.2.2 In terms of the competitive assessment, it was established that the parties were not in direct competition in Zambia because Lafarge never sold its cement from Zimbabwe and South Africa. However, it was observed that the Lafarge plants in Zimbabwe were a potential source of competition and posed the danger of being alternative sources of cement into the Zambian market in case Chilanga cement plant was closed down based on Lafarge's global economies of scale to maximize profits. Zambia at the time was categorized as a high cost producer of most merchandise including cement.

3.2.3 It was further observed that PAC also owned the Mbeya plant in Tanzania and another in Malawi, which were all part of the sale and purchase agreement. Thus it was seen possible for Lafarge to supply most areas in Zambia from its other plants in the neighbouring countries. The fear was that should such a situation arise, grave public interest issues would emerge including adverse effects on the employees, ancillary local enterprises and national trade.

3.3 Issues of Public Interest

3.3.1 The major concern for Zambia Competition Commission was the need to continue experiencing some domestic competitive pressures on the sole supplier of cement, the subject of the takeover. Import competition has therefore been looked at favourably but not at the expense of domestic production.

3.3.2 Secondly, it has felt that Zambia should continue with its pursuits for sources of hard currency because it is landlocked and its production systems were import-dependent. Accordingly, the initiatives aimed at earning Non-traditional exports (NTEs) through exports of cement and other products, is a national priority. The Burundi market is good for Zambia but the PAC plant in Tanzania is new and more efficient but not very competitive on quality of cement. On this basis cement exports to Burundi could not be safeguarded under a merged entity and that pricing of the commodity into that market had to be rationalized to the advantage of all parties.

3.3.3 The other concern is that Burundi, Zambia and Malawi are members of the COMESA Free Trade Area while Tanzania is not a member. While Zambia has a competition law to regulate behaviour of trans national corporations, Malawi and Tanzania did not have competition legislations. In the absence of a regional competition framework, any efforts to regulate behaviour of trans national corporations at the regional level were futile.

4.0 The Takeover of Tate and Lyle Shares in Zambia Sugar Plc by Illovo Sugar Limited.

4.1 Introduction and Relevant Background Information

4.1.1 Illovo is Africa's leading sugar producer and a significant manufacturer of downstream products with agricultural, manufacturing and other interests extending over six Southern African countries namely; Malawi, Mauritius, Mozambique, South Africa, Swaziland, and Tanzania. It also produces sugar from beet in the United States.

4.1.2 T&L is a British multinational company with business interests in Africa, United Kingdom, Western and Eastern Europe, North America, Australia and Asia. In Africa, T&L operates in the sugar and sugar packaging businesses in Botswana, Kenya, Zambia and Zimbabwe. It has business interests in Zambia Sugar and Kabwe Industrial Fabrics Company Limited in Zambia. T&L controls 50.87% share of Zambia Sugar Plc. T&L is listed on the London Stock Exchange.

4.1.3 T&L used its pre-emptive rights to acquire over 50% shares in ZS at the time of its privatisation. It is listed on the Lusaka Stock Exchange following its privatisation. ZS is the largest sugar manufacturing and refining company in Zambia with approximately 96% market share. It cultivates and mills sugar and markets refined sugar from its estates at Nakambala in Mazabuka.

4.2 Nature of the Takeover

4.2.1 The takeover was an acquisition of 50.87% shares in Zambia Sugar through the Lusaka Stock Exchange. Any acquisition of 50% or more shares by any one entity attracts the attention of the Zambia Competition Commission because is the same as acquisition of the whole organisation.

4.2.2 While the merger is a domestic transaction, in assessing the takeover, the Commission reviewed the regional impact of the merger because of the likely anticompetitive effects of the merger at the regional level.

4.3 Legal Contravention and Issues for Decision

4.3.1 The merger notification is in line with the provisions of Section 8 of the Competition and Fair Trading Act (Act) Chapter 417 of the Laws of Zambia that demands a mandatory notification of any takeovers/mergers or acquisition of assets of one company by another. Section 8(2) of the Act nullifies any merger or takeover that is not notified with the Commission.

4.3.2 The issue for decision was whether or not the proposed takeover of T&L shares and the management of ZS by Illovo were likely to restrict, distort or prevent competition to an appreciable extent in the market or substantial part of the market in violation of section 7 of the Act.

4.4 Major Findings

4.4.1 The motive of the takeover was not likely to lead to the prevention, distortion or restriction of competition in the relevant market (Zambia). In the domestic market, ZS is a de facto monopoly and the takeover of the major shareholding in the company is not likely to change its monopoly status in the market. At the regional level however, Illovo would still face competition from many regional players.

4.4.2 It was however, noted that the takeover by Illovo had the likely effect of creating a regional dominant firm because of its current regional coverage. Investigations revealed that Illovo had manufacturing and other interests extending over six Southern African countries namely: Malawi, Mauritius, Mozambique, South Africa, Swaziland, and Tanzania. The addition of Zambia obviously implies that Illovo becomes the regional dominant player controlling a significant share of the region market.

4.4.3 The motive of Illovo in acquiring the 50.87% shares of T&L in ZS is meant to consolidate itself at the regional level. In the region, Illovo is the leading supplier of sugar with 35% market share and it was likely to consolidate its position even further with the proposed acquisition of ZS. Its regional market share was likely to increase to 39%. The acquisition could be the removal of a potentially vigorous and effective competitor in the regional market.

4.5 Decisions of the Board of Commissioners

4.5.1 The Board of Commissioners authorised the application for the takeover of 50.87% shares of T&L in ZS by Illovo Sugar of South Africa be authorised since the takeover was not likely to lead to the restriction, prevention or distortion of competition in the relevant market (Zambia).

4.5.2 The impact of the takeover at a regional level has no legal basis for regulation. In the absence of a regional competition framework, there is no basis for rejecting the takeover. Currently Illovo has no sugar operations in Zambia. The takeover does not amount to the elimination of one competitor in the market.

4.5.3 The Board directed the Commission to request the Securities and Exchange Commission (SEC) to waive the requirement that Illovo should make a mandatory and equivalent offer to the minority shareholders to prevent entrenching the position Illovo in ZS. This is to prevent minority shareholders like CDC from selling their shares and ensure the participation of Zambian nationals and institutions in ZS. This request is based on public interest aimed at ensuring that basic industries in Zambia should at least be partly owned by Zambian citizens or institutions.

II. – QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

1. Please provide a citation and as much of the following information as possible for each case since January 1, 2000 in which your economy challenged a hard-core cartel – i.e., an anticompetitive agreement among competitors to fix prices, restrict output, rig bids, or divide or share markets.

(a) Each **respondent's name**, the covered **product or service** and **geographic area**, and the approximate beginning and ending dates of the cartel.

No.	Respondent	Product/Service	Geog. Area	Time Span
1.	BP Zambia Limited	Petroleum	Zambia	1997-2001
2.	Caltex (Z) Limited	"	"	"
3.	Total Zambia Limited	"	"	"
4.	Mobil Oil (Z) Limited	"	"	"
5.	Agip Zambia Limited	"	"	"
6.	Hybrid Poultry Ltd Tamba Chicks Limited and Mariandale Poultry Farm	Poultry	Zambia with major concentrations in the Lusaka, Copperbelt Southern regions	1997-2000

(b) Whether the **evidence of collusion** was direct (written or testimonial) or indirect; the nature of any indirect evidence.

Petroleum Sector

i) **Direct:** decisions of the Cartel meetings as reported to the Energy Regulations Board (the Sector Regulator)

ii) Price adjustment applications by a designated member of the cartel to Energy Regulations Board upon approval of the application all oil marketing companies set the approved pump prices.

iii) ***Indirect:*** *Uniform price adjustments either upwards or downwards.*

iv) A junior employee of one the companies wondered why Oil Marketing Companies should be exchanging market information in a liberalised market.

Poultry Sector

i) ***Direct****: One player complained to the Commission and submitted copies of agreements compelling the parties buy day old chicks only from the cartel leader.*

ii) ***Indirect****: Comparatively very similar prices.*

(c) **Amount of commerce**: Estimated monetary value of all sales of the product or service in the geographic area during the cartel (i) annually and (ii) during the cartel. If possible, the same information for all sales by cartel members. For bid rigging, the magnitude of the contract(s) affected.

Sector	**Annual Sales (US$)**	**Cartel Sales (US$)**
Petroleum (Cartel)	316, 000, 000	425,000 000
Poultry (Price Fixing)	4, 617, 600	8, 773, 440

(d) **Sanctions:** The monetary value of the fines and other financial sanctions imposed, in total and against each party, under (i) the competition law or (ii) other law. Rationale for the level of competition law sanction, such as a percentage of relevant turnover or of the illegal gain or the loss to victims. A description of other orders, including imprisonment.

i) Cease and desist orders issued, failure to comply attracts 100,000 penalty units fine under Section 16 of the Competition & Fair Trading Act, or imprisonment to 5 years, or both.

ii) Relevant senior officers summoned and cautioned by the Commission

iii) Undertakings signed with the Commission

2. From all of these cases, please consider when the facts most clearly illustrated the harmfulness of cartels and/or the knowledge of cartel members that the conduct was illegal and/or harmful.

i) Consumers complained to the Commission of uniform high prices and common price increases by the players in the market and negative press reports.
ii) An aggrieved party to the agreement lodged a complaint to the Commission

*(a) Please supply quotations (preferably) or descriptions of cartel members' oral or written statements concerning the cartel's **actual or intended effect on price**.*

i) Copies of correspondence between the parties and minutes of their meetings.
ii) Exchange of sales statistics and price application by one member and followed by others.

*(b) Please describe evidence concerning **changes in price or output** when the cartel was formed or when it ceased; **other harmful effects** of the cartel – e.g., on quality, entry, innovation, or efficiency; **changes in firm profits** when the cartel was formed or when it ceased; **excess profits** during the cartel.*

Changes in price or output- Petroleum Sector

i) Entry of two new players in the petroleum industry with wider consumer choice after Commission instituted investigations. Price discounts on the pump prices have been experienced in various service stations owned by the competitors.

Harmful effects of the Cartel in the- Petroleum Sector

ii) There was uniform price for all service stations despite differences in overheads thereby eliminating competition in the market.
iii) There is absence of independent decision making by smaller operators. The cartel leaders meet deviation from standard behaviour harshly.

Changes in the Price or Output- Poultry Sector

i) Entry of a formidable new competitor in the poultry industry after the Commission's intervention.
ii) The output in terms of day-old chicks has significantly increased with increased customer choice.
iii) The price of day-old chicks had reduced from the high of US$0.76 to between US$0.37 and US$0.40 per chick, which reduced the overall price of table chickens.
iv) The excess profits earned by the cartel leader were significantly reduced and the weaker cartel members immediately abandoned the cartel leader and stopped doing business with the cartel leader.

Harmful effects of the Cartel- Poultry Sector

i) Prices had at one time increased to a price level of US$0.76 per Day old chick.
ii) Inconsistent quality of output and regulated output level to maintain high prices.

*(c) Please describe or quote the most **colourful statements** by cartel members revealing their intent, their lack of justification, their awareness of the illegality of their conduct, etc.*

Petroleum Sector

i) "It is a global industry practice to exchange market information on prices"
ii) "There has not been any harmful effects on the market"
iii) "We've always been doing this and did not see anything wrong now…"
iv) We are working together to resolve the oil marketing problems that the country was facing for the good of the economy.

Poultry Sector

i) It is normal business practice to maintain long term contracts in the poultry industry.
ii) These agreements are meant to protect the local industry and have maintained a disease free environment for a long time now.
iii) The agreements have ensured consistent supply of output without any distortions in the market.

*(d) Please describe other **dramatic demonstrations** of cartels' harm, such as conduct aimed at particularly sympathetic victims (e.g., old people, children), or otherwise outrageous conduct (e.g., blowing up a factory).*

B. General Information on Sanctions

*4. Please indicate the applicable **standard of proof and the available sanctions** for competition enforcement in your economy, responding separately for each different type of enforcement (administrative, civil, or criminal) that is used.*

i) Sanctions are applicable to formal, informal, written and unwritten, implicit and explicit agreements or understandings amongst players.

ii) Administrative sanctions involve ordering the termination/revocation of an agreement forthwith (Cease and Desist Orders);

iii) civil sanctions involves payment of 100,000 penalty units, which is equivalent to ZK 18 million (US$4762)

iv) Criminal nature of cartels may lead to a penalty as stated in iii above and /or an imprisonment term of up to 5 years in jail.

*5. Please supply or describe any **general schedule or set of principles** used in your economy for calculating fines and other sanctions for (a) economic law violations or crimes in general, (b) competition law violations, and (c) procurement fraud, tax fraud, securities fraud, and other comparable offences. Please provide also the maximum penalties with respect to the above.*

i) Fines are based on penalty units as specified in the Act. Government normally establishes the value of a penalty unit through a Statutory Instrument every year.

ii) In addition, prison terms are specified up to a stated maximum of 5 years in the Competition and Fair Trading Act.

iii) Adjudicative powers in these matters lie with the High Court of Zambia.

Non classifié **C(98)35/FINAL**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

OLIS : 13-May-1998
Dist. : 14-May-1998

C(98)35/FINAL
Non classifié

CONSEIL

Conseil

RECOMMANDATION DU CONSEIL CONCERNANT UNE ACTION EFFICACE CONTRE LES ENTENTES INJUSTIFIABLES

(adoptée par le Conseil lors de sa 921ème session, le 25 mars 1998 [C/M(98)7/PROV])

65461

LE CONSEIL,

Vu l'article 5b) de la Convention relative à l'Organisation de Coopération et de Développement Economiques, en date du 14 décembre 1960 ;

Vu les Recommandations précédentes du Conseil reconnaissant "que l'application efficace de la politique de la concurrence joue un rôle essentiel pour le développement des échanges internationaux car elle assure un fonctionnement dynamique des marchés à l'échelon national et favorise la diminution ou la réduction des obstacles à l'accès rencontrés par les importations étrangères" [C(86)65(Final)] ; et "que les pratiques anticoncurrentielles peuvent constituer un obstacle à la croissance économique, à l'expansion des échanges et à d'autres objectifs économiques des pays Membres" [C(95)130/FINAL] ;

Vu la Recommandation du Conseil visant à ce que les exemptions du droit de la concurrence ne soient pas plus larges qu'il est nécessaire [C(79)155(Final)] et l'accord intervenu dans le Communiqué de la réunion du Conseil au niveau des Ministres de 1997 visant à "combler les lacunes d'ordre sectoriel que peut comporter le champ d'application du droit de la concurrence, sauf à prouver que les intérêts primordiaux de la collectivité ne peuvent être servis par des moyens plus efficaces" [C/MIN(97)10] ;

Vu la position adoptée de longue date par le Conseil, selon laquelle une coopération plus étroite est nécessaire pour agir efficacement contre les pratiques anticoncurrentielles des entreprises situées dans un pays susceptibles d'affecter les intérêts d'autres pays Membres et qui ont des effets préjudiciables sur les échanges internationaux, et la recommandation selon laquelle, si leurs législations les y autorisent et si cela ne va pas à l'encontre de leurs intérêts légitimes, les pays Membres devraient coordonner les enquêtes d'intérêt mutuel et se conformer aux demandes d'autres pays Membres visant à l'échange d'informations figurant dans leurs dossiers et à l'obtention d'informations de tiers ainsi qu'à l'échange de ces informations [C(95)130/FINAL] ;

Reconnaissant les résultats spécifiques dont s'accompagne la possibilité, pour les autorités de la concurrence de certains pays Membres, d'échanger avec une autorité étrangère chargée de la concurrence des informations confidentielles concernant une enquête dans des cas d'intérêt mutuel, en vertu de conventions et d'accords de nature multilatérale et bilatérale, et considérant que la plupart des autorités chargées de la concurrence n'ont actuellement pas le droit d'échanger avec des autorités étrangères chargées de la concurrence des informations concernant une enquête ;

Reconnaissant en outre que la coopération sous forme de partage d'informations confidentielles suppose préalablement une protection contre toute divulgation ou utilisation abusive de ces informations et peut imposer de résoudre d'autres problèmes, comme les éventuelles difficultés relatives aux différences de champ d'application territoriale du droit de la concurrence ou de nature des sanctions dont sont passibles les infractions au droit de la concurrence ;

Considérant que les ententes injustifiables constituent la violation la plus flagrante du droit de la concurrence et lèsent les consommateurs dans un grand nombre de pays en augmentant les prix et en limitant la production, des biens et services étant alors totalement indisponibles pour certains acheteurs et inutilement onéreux pour d'autres ; et

Considérant qu'une action efficace contre les ententes injustifiables revêt une importance toute particulière du point de vue international, parce qu'en faussant les échanges internationaux ces ententes sont source de pouvoir de marché, de gaspillage et d'inefficience dans des pays dont les marchés seraient sinon concurrentiels, et qu'une telle action est tout spécialement tributaire d'une coopération, parce que

ces ententes ont généralement un caractère secret et que les éléments de preuve s'y rapportant peuvent être situés dans un grand nombre de pays,

I. RECOMMANDE ce qui suit aux gouvernements des pays Membres :

A. CONVERGENCE ET EFFICACITE DES LEGISLATIONS INTERDISANT LES ENTENTES INJUSTIFIABLES

1. Les pays Membres devraient faire en sorte que leur législation de la concurrence mette fin aux ententes injustifiables et aie un effet dissuasif à l'égard de ces ententes. Cette législation devrait en particulier prévoir :

a) des sanctions efficaces, d'une nature et d'un niveau propres à dissuader les personnes physiques et morales de participer à ces ententes ;

b) des procédures et des instances d'exécution dotées de pouvoirs d'enquête suffisants pour déceler les ententes injustifiables et y remédier, y compris les prérogatives nécessaires pour obtenir des documents et des informations et prononcer des sanctions en cas d'inexécution.

2. Aux fins de la présente Recommandation :

a) on entend par "entente injustifiable" un accord anticoncurrentiel, une pratique concertée anticoncurrentielle ou un arrangement anticoncurrentiel entre concurrents visant à fixer des prix, procéder à des soumissions concertées, établir des restrictions ou des quotas à la production, ou à partager ou diviser des marchés par répartition de la clientèle, de fournisseurs, de territoires ou de lignes d'activité ;

b) la catégorie des ententes injustifiables ne comprend pas les accords qui (i) sont raisonnablement liés à la réalisation licite d'éléments d'efficience par réduction des coûts ou accroissement de la production, (ii) sont exclus, directement ou indirectement, du champ d'application des législations de la concurrence d'un pays Membre ou (iii) qui sont autorisés conformément à ces législations. Toutefois, toute exclusion ou autorisation de ce qui constituerait sinon une entente injustifiable devrait se faire dans la transparence et être réexaminée périodiquement afin de déterminer si elle est nécessaire et ne va pas au-delà de ce qui est indispensable pour réaliser ses objectifs primordiaux. Après la publication de la présente Recommandation, les pays Membres devront notifier chaque année à l'Organisation l'adoption ou la prorogation de telles exclusions ou catégories d'autorisation.

B. COOPERATION ET COURTOISIE INTERNATIONALES POUR L'APPLICATION DES LEGISLATIONS INTERDISANT LES ENTENTES INJUSTIFIABLES

1. Les pays Membres ont un intérêt commun à empêcher les ententes injustifiables et ils devraient coopérer pour l'application des législations qu'ils ont adoptées contre ces ententes. Ils devraient à cet égard rechercher les moyens susceptibles d'améliorer la coopération en appliquant les principes de courtoisie positive aux demandes visant à ce que l'autre pays remédie à un comportement anticoncurrentiel préjudiciable pour les deux pays et ils devraient exercer leurs propres activités

d'exécution conformément aux principes de courtoisie lorsque ces activités affectent des intérêts importants d'autres pays.

2. La coopération entre les pays Membres dans le domaine des ententes injustifiables devrait reposer sur les principes suivants :

a) l'intérêt commun à empêcher les ententes injustifiables justifie généralement une coopération, dans la mesure où cette coopération serait compatible avec les lois, la réglementation et les intérêts importants du pays requis ;

b) dans la mesure compatible avec les lois, la réglementation et les intérêts importants des pays Membres, et sous réserve de sauvegardes efficaces pour préserver les informations commercialement sensibles et les autres informations confidentielles, l'intérêt mutuel des pays Membres à empêcher les ententes injustifiables appelle une coopération pouvant comprendre l'échange de documents et informations en leur possession avec les autorités étrangères chargées de la concurrence et la collecte de documents et informations pour le compte d'autorités étrangères chargées de la concurrence, sur une base volontaire et si nécessaire par voie de contrainte ;

c) un pays Membre peut refuser d'exécuter une demande d'entraide ou limiter sa coopération ou la subordonner à certaines conditions parce qu'il considère que l'exécution de la demande ne serait pas conforme à ses lois ou sa réglementation, ne correspondrait pas à ses intérêts importants ou pour tout autre motif, y compris des contraintes en matière de ressources de son autorité chargée de la concurrence ou l'absence d'un intérêt mutuel dans l'enquête ou l'instruction concernée ;

d) les pays Membres devraient convenir de procéder à des consultations sur les questions concernant la coopération.

Afin d'établir un cadre pour leur coopération dans la lutte contre les ententes injustifiables, les pays Membres sont encouragés à envisager de conclure des accords ou autres instruments bilatéraux ou multilatéraux conformes à ces principes.

3. Les pays Membres sont encouragés à examiner tous les obstacles à une coopération efficace pour la mise en oeuvre des législations contre les ententes injustifiables et à envisager des actions, y compris des législations nationales et/ou des accords ou autres instruments bilatéraux ou multilatéraux, leur permettant d'éliminer ou d'atténuer ces obstacles en conformité avec leur intérêts importants.

4. La coopération envisagée dans la présente Recommandation ne préjuge pas de toute autre coopération pouvant exister conformément aux Recommandations antérieures du Conseil, en vertu de tout accord bilatéral ou multilatéral applicable auquel les pays Membres peuvent être partie ou à tout autre titre.

II. CHARGE le Comité du droit et de la politique de la concurrence :

1. de tenir un registre des exclusions et autorisations notifiées à l'Organisation en vertu du paragraphe I. A 2b) ;

2. de faire office, à la demande des pays Membres concernés, de forum pour les consultations se rapportant à l'application de la Recommandation ;

3. d'examiner l'expérience des pays Membres dans l'application de la présente Recommandation et de faire rapport au Conseil dans les deux ans sur toute autre action nécessaire pour améliorer la coopération dans la mise en oeuvre des interdictions des ententes injustifiables édictées par le droit de la concurrence.

III. INVITE les pays non membres à s'associer à cette Recommandation et à la mettre en oeuvre.

ANNEXE A

Déclaration relative à l'association de non-membres à la recommandation du Conseil de l'OCDE concernant une action efficace contre les ententes injustifiables

1. A la section III de sa recommandation de 1998 concernant une action efficace contre les ententes injustifiables [C(98)35/FINAL], le Conseil de l'OCDE « invite les pays non membres à s'associer à [la] recommandation et à la mettre en œuvre ». Abordant maintenant une nouvelle phase renforcée de son programme anti-ententes, le Comité du droit et de la politique de la concurrence tient à souligner cet encouragement prodigué aux non-membres intéressés et à faciliter la procédure d'association. A cet effet, la présente déclaration clarifie la nature de l'association et les procédures qui seront appliquées pour examiner les demandes d'association émanant des non-membres. Toutes informations complémentaires pourront être obtenues auprès du Secrétariat, Division du droit et de la politique de la concurrence, Direction des affaires financières, fiscales et des entreprises, OCDE.

2. La recommandation a été adoptée par le Conseil de l'OCDE et c'est ce dernier qui, en concertation avec le Secrétaire général et le Comité chargé de la coopération avec les non-membres (CCN) se prononce sur les demandes d'association. Le gouvernement d'un pays non membre souhaitant soumettre une demande officielle d'association devra adresser cette demande au Secrétaire général.

3. La lettre de demande d'association à la recommandation devra être accompagnée d'un rapport, rédigé en français ou en anglais, décrivant les dispositions juridiques de fond du non-membre applicables aux ententes (telles qu'interprétées par son autorité de la concurrence et ses tribunaux) ; les instruments d'enquête pouvant être utilisés et les sanctions pouvant être prononcées, ainsi que leur mise en œuvre dans la pratique ; les lois et procédures régissant le traitement des informations confidentielles dans les affaires de concurrence. Les non-membres sont également invités à décrire toute loi ou politique influant notablement sur leur capacité d'agir contre les ententes ou de coopérer dans les enquêtes relatives à des ententes. Ce rapport sera transmis au Secrétariat, Division du droit et de la politique de la concurrence, OCDE, qui déterminera s'il contient les éléments demandés. Si tel est le cas, le Secrétariat transmettra les documents au Comité du droit et de la politique de la concurrence ; dans le cas contraire, il fera savoir au pays non membre que le rapport est déficient à cet égard. Le Secrétariat n'examinera pas l'exhaustivité ou l'exactitude du rapport, la responsabilité de cette exhaustivité et de cette exactitude incombant au pays non membre.

4. Une fois achevé son examen du rapport transmis par le Secrétariat, le Comité du droit et de la politique de la concurrence adressera ses recommandations au Conseil, via le CCN. Le Comité du droit et de la concurrence considère qu'une large association à la recommandation et la mise en œuvre de cette dernière contribueront à mettre fin à la ponction de plusieurs milliards de dollars que les ententes exercent sur l'économie mondiale et à instaurer des liens de coopération plus étroits entre les autorités de la concurrence du monde entier. Par conséquent, le Comité ne s'attachera pas dans ses recommandations à la question de savoir si un non-membre paraît ou non se conformer, au moment considéré, aux meilleures pratiques de l'OCDE ; il s'agira de déterminer si les lois et politiques du non-membre paraissent refléter une détermination à agir dans le sens d'une mise en œuvre efficace, efficiente et coopérative. S'il est un fait que le Comité du droit et de la politique de la concurrence est en faveur d'une large association à la recommandation et a pour objectif d'exploiter les possibilités de liens plus actifs et plus interactifs avec les non membres, il est entendu que l'association à la recommandation ne confère pas le droit au non-membre de participer aux réunions du Comité du droit et de la politique de la concurrence et ne créé aucun autre droit ni aucune autre obligation.

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUE

DIFFUSION RESTREINTE

Paris, réd. : 7-Jul-1995
OLIS : >
dist. : >

C(95)130

Or. Fra.

CONSEIL

PROJET DE RECOMMANDATION REVISEE DU CONSEIL SUR LA COOPERATION ENTRE PAYS MEMBRES DANS LE DOMAINE DES PRATIQUES ANTICONCURRENTIELLES AFFECTANT LES ECHANGES INTERNATIONAUX

(Note du Secrétaire général)

Le projet de Recommandation révisée du Conseil a été approuvé par le Comité du droit et de la politique de la concurrence (CLP) sous réserve de quelques corrections mineures suggérées par la délégation britannique. Elles sont soumises au CLP pour approbation d'ici le 10 juillet 1995. Afin que le Comité exécutif dispose d'un délai suffisant pour l'examiner, ce projet lui est cependant soumis dès maintenant en vue de sa réunion du 19 juillet 1995.

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1. Lors de sa 67ème session, les 18 et 19 mai 1995, le Comité du droit et de la politique de la concurrence a approuvé ad referendum le projet de Recommandation du Conseil sur la coopération entre pays Membres dans le domaine des pratiques anticoncurrentielles affectant les échanges internationaux [DAFFE/CLP(95)32]. Il a convenu qu'en l'absence de demandes de corrections supplémentaires d'ici au 30 juin 1995, ce projet serait alors définitivement approuvé et devrait être transmis dans les meilleurs délais au Conseil pour adoption.

2. Ce projet de Recommandation constitue une révision de la Recommandation du Conseil sur la coopération entre pays Membres dans le domaine des pratiques commerciales restrictives affectant les échanges internationaux, adoptée initialement en 1967 puis successivement révisée en 1973, 1979 et 1986 [C(86)44(Final)]. Cette nouvelle révision a pour objet d'adapter la coopération internationale en matière d'application des règles de concurrence aux récents changements de comportements économiques, notamment ceux liés à la globalisation des marchés, comme cela s'est fait dans un certain nombre de domaines de la législation économique, par exemple, la fiscalité, les valeurs mobilières, le blanchiment des capitaux.

3. La fusion Gillette-Wilkinson réalisée en 1990, qui a été examinée dans plusieurs pays, a constitué un catalyseur des travaux entrepris par le Comité du droit et de la politique de la concurrence dans le domaine de la coopération et des échanges d'information en matière de concurrence. Il a, en effet, été généralement reconnu que la coopération et des échanges d'informations entre pays Membres sur cette affaire auraient facilité l'enquête et les procédures dont cette fusion a fait l'objet. Cette constatation a conduit à l'élaboration d'une étude sur les procédures de contrôle des fusions[1] et à un examen de l'efficacité de la Recommandation révisée du Conseil de 1986. Ces deux projets se sont rejoints sur un point, à savoir l'élaboration d'une nouvelle Recommandation révisée du Conseil. Les principales modifications apportées à la Recommandation existante sont énumérées ci-dessous.

Recommandation

4. La Recommandation actuelle pose quatre principes concernant la notification, l'échange d'informations et la coordination d'action (partie I. A.), et la consultation et la conciliation par les pays Membres sur des questions concernant les pratiques anticoncurrentielles (partie I.B.). Un Appendice à la Recommandation présente des indications de procédures plus spécifiques pour la mise en oeuvre de la Recommandation. Dans la proposition de révision (en Annexe à cette Note), il n'y a pas d'amendements de substance à la Recommandation elle-même ; ils portent uniquement sur l'Appendice. La partie la plus importante de la Recommandation, dans la perspective de cette révision, est la partie I.A. qui préconise trois types de coopération : la notification de toute enquête ou procédure susceptible d'affecter des intérêts importants d'un autre pays Membre, la coordination des enquêtes ou procédures engagées concurremment par deux pays Membres ou plus et l'assistance aux autres pays Membres par la fourniture de renseignements pertinents, dans le respect des intérêts nationaux légitimes.

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1. Cette étude a fait l'objet d'une publication intitulée "Le Contrôle des fusions et le monde des affaires - méthodes et procédures" OCDE, 1994.

Appendice

5. Les amendements à l'Appendice se limitent à des dispositions concernant la coopération et la coordination. Aucun changement ne concerne les paragraphes relatifs à la consultation et à la conciliation. Il a été rajouté au paragraphe 1 la réaffirmation du principe selon lequel la coopération prévue par la Recommandation s'inscrit dans le respect des lois et des intérêts nationaux des pays Membres. Il invite également les pays Membres à étudier les mesures juridiques permettant l'application de la Recommandation.

6. Les paragraphes 3 et 4 qui concernent la notification d'enquêtes ou les procédures de notification, correspondent aux premiers des trois types de coopération définis dans la partie I.A. de la Recommandation. De nouvelles circonstances dans lesquelles la notification serait appropriée incluent la possibilité de mesures correctrices visant à imposer ou au contraire à interdire un comportement déterminé sur le territoire d'un autre pays Membre. Une définition plus précise est également recherchée des circonstances dans lesquelles l'enquête sur une fusion transnationale entreprise par un pays peut affecter des "intérêts importants" d'un autre pays.

7. Le paragraphe 5, qui est entièrement nouveau, traite de la coordination des enquêtes et des procédures concomitantes. Il précise qu'une telle coordination devrait être assurée au cas par cas et comporter la notification des calendriers et programmes retenus, le partage d'informations dans le respect des lois nationales sur la confidentialité, la coordination des négociations et de la mise en oeuvre des mesures correctrices. Il encourage les entités faisant l'objet d'enquêtes concomitantes à coopérer avec les efforts conjoints ainsi déployés, lorsque cela est dans leur intérêt, notamment en permettant à un ou plusieurs organismes d'accéder à des informations confidentielles lorsque la loi les y autorise.

8. Les paragraphes 6 à 9 traitent de l'assistance lors d'un enquête ou d'une procédure engagée par un autre pays sous la forme de communication d'informations à la demande. Les paragraphes 6 et 7 sont également entièrement nouveaux. Le paragraphe 6 décrit différents moyens par lesquels l'information peut être fournie par une Autorité de la concurrence à une autre, y compris l'obtention d'information par des moyens coercitifs. Comme pour les enquêtes concomitantes, il est précisé que la coopération devra se faire au cas par cas, cette assistance étant soumise aux lois nationales applicables de l'organisme apportant son concours. Le paragraphe 7 encourage la notification par un pays de pratiques anticoncurrentielles se produisant dans un autre pays et risquant de violer les lois de ce dernier.

9. Le paragraphe 9 prévoit des consultations relatives au partage des coûts lorsqu'une assistance est fournie à un organisme de contrôle de la concurrence étranger. Le paragraphe 10 établit les principes de protection des informations confidentielles.

10. Le Secrétaire général estime que cette nouvelle révision permet d'établir une série de principes qui favorisent la coopération internationale en matière d'application des règles de concurrence et répondent aux exigences de son renforcement. Ces principes pourront le cas échéant être incorporés dans des accords de coopération spécifiques, bilatéraux ou multilatéraux, la Recommandation favorisant ainsi la coopération internationale dans les domaines où elle est souhaitée et nécessaire.

11. En conséquence, le Secrétaire général invite le Conseil à adopter le projet suivant d'inscription à son procès verbal :

LE CONSEIL

a) prend note de la note du Secrétaire général C(95)130 ;

b) adopte le projet de Recommandation révisée sur la coopération entre pays Membres dans le domaine des pratiques anticoncurrentielles affectant les échanges internationaux annexé à la Note C(95)130 et convient de sa mise en diffusion générale.

ANNEXE

PROJET DE RECOMMANDATION REVISEE DU CONSEIL

sur la coopération entre pays Membres dans le domaine
des pratiques anticoncurrentielles
affectant les échanges internationaux

LE CONSEIL,

Vu l'article 5 b) de la Convention relative à l'Organisation de Coopération et de Développement Economiques, en date du 14 décembre 1960 ;

Considérant qu'il existe de longue date entre les pays Membres de l'OCDE une coopération internationale dans le domaine du contrôle des pratiques anticoncurrentielles affectant les échanges internationaux, sur la base des Recommandations successives du Conseil du 5 octobre 1967 [C(67)53(Final)], du 3 juillet 1973 [C(73)99(Final)], du 25 septembre 1979 [C(79)154(Final)] et du 21 mai 1986 [C(86)44(Final)] ;

Considérant les recommandations de l'étude sur les fusions transnationales et les procédures de contrôle des fusions, réalisée à l'intention du Comité du droit et de la politique de la concurrence ;

Reconnaissant que les pratiques anticoncurrentielles peuvent constituer un obstacle à la croissance économique, à l'expansion des échanges et à d'autres objectifs économiques des pays Membres ;

Reconnaissant que l'internationalisation de plus en plus marquée des activités des entreprises augmente d'autant le risque que les pratiques anticoncurrentielles mises en oeuvre dans un pays ou qu'un comportement coordonné d'entreprises situées dans différents pays puisse porter atteinte aux intérêts de pays Membres et accroît en outre le nombre de fusions transnationales soumises à la réglementation en matière de contrôle des fusions de plus d'un pays Membre ;

Reconnaissant que l'application unilatérale de la législation nationale à des cas impliquant des opérations commerciales dans d'autres pays soulève des problèmes quant au champ respectif de souveraineté des pays concernés ;

Reconnaissant que les pays Membres doivent mettre en application les principes du droit international et de la courtoisie internationale et faire preuve de modération et de retenue dans l'intérêt de la coopération dans le domaine des pratiques anticoncurrentielles ;

Reconnaissant que les enquêtes et procédures engagées par un pays Membre dans le domaine des pratiques anticoncurrentielles peuvent, dans certains cas, affecter d'importants intérêts d'autres pays Membres ;

Considérant par conséquent que les pays Membres doivent coopérer pour la mise en oeuvre de leur législation nationale respective afin de remédier aux effets nocifs des pratiques anticoncurrentielles ;

Considérant, en outre, qu'une coopération plus étroite entre les pays Membres est nécessaire pour agir efficacement contre les pratiques

anticoncurrentielles des entreprises situées dans les pays Membres, lorsque ces pratiques affectent les intérêts d'un ou de plusieurs autres pays Membres et ont des effets préjudiciables sur les échanges internationaux ;

Considérant par ailleurs qu'une coopération plus étroite entre pays Membres sous la forme d'une notification, d'un échange d'informations, d'une coordination des actions, de consultations et d'une conciliation, sur une base entièrement volontaire, devrait être encouragée, étant entendu que cette coopération ne doit en aucune manière s'interpréter comme portant atteinte à la position juridique des pays Membres en ce qui concerne les questions qui peuvent se poser sur le plan de la souveraineté et notamment de l'application extraterritoriale des lois concernant les pratiques anticoncurrentielles ;

Reconnaissant qu'il est souhaitable de mettre en place des procédures qui permettent au Comité du droit et de la politique de la concurrence d'agir comme forum pour procéder à des échanges de vues, à des consultations et à une conciliation sur les questions liées aux pratiques anticoncurrentielles qui affectent les échanges internationaux ;

Considérant que les pays Membres jugeant opportun de conclure des accords bilatéraux de coopération pour mettre en oeuvre la réglementation nationale de la concurrence devraient tenir compte de la présente Recommandation et des Principes directeurs qui y sont annexés :

I. RECOMMANDE aux gouvernements des pays Membres, dans la mesure où leurs lois le permettent :

A. NOTIFICATION, ÉCHANGE D'INFORMATIONS ET COORDINATION DES ACTIONS

1. Lorsqu'un pays Membre engage en application de sa réglementation de la concurrence une enquête ou une procédure pouvant affecter des intérêts importants d'un ou de plusieurs autres pays Membres, il devrait le notifier à ce ou ces pays Membres, si possible à l'avance et, en tout cas, à un moment qui facilite les commentaires ou les consultations ; grâce à une telle notification préalable, le pays Membre qui engage une enquête ou une procédure, tout en conservant sa pleine liberté d'action quant à la décision finale, pourrait tenir compte du point de vue qu'est susceptible d'exprimer l'autre pays Membre et des mesures correctrices que celui-ci estime pouvoir prendre en vertu de ses propres lois à l'égard des pratiques anticoncurrentielles ;

2. Lorsque deux pays Membres ou plus engagent une enquête ou une procédure à l'égard d'une pratique anticoncurrentielle affectant les échanges internationaux, ils devraient s'efforcer de coordonner leur action autant qu'il est opportun et possible de le faire ;

3. Par des consultations ou d'une autre manière, les pays Membres devraient coopérer à la mise au point ou à l'application de mesures satisfaisantes et fructueuses pour chacun d'entre eux en vue de faire face aux pratiques anticoncurrentielles affectant les échanges internationaux. A cet égard, ils devraient échanger entre eux les renseignements pertinents sur les pratiques anticoncurrentielles que leurs intérêts légitimes leur permettent de divulguer ; ils devraient autoriser, sous réserve de garanties appropriées, notamment en ce qui concerne la confidentialité, la communication

d'informations aux autorités compétentes des pays Membres par les autres parties concernées, soit de façon unilatérale, soit dans le cadre d'arrangements bilatéraux ou multilatéraux, à moins qu'une telle coopération ou communication ne soit contraire à d'importants intérêts nationaux.

B. CONSULTATION ET CONCILIATION

4. a) Un pays Membre qui estime qu'une enquête ou une procédure engagée par un autre pays Membre au titre de sa législation de la concurrence peut affecter d'importants intérêts le concernant devrait transmettre ses vues sur la question à l'autre pays Membre ou demander à entrer en consultation avec celui-ci ;

b) Sans préjudice de la poursuite de son action en application de sa réglementation de la concurrence et de son entière liberté de décision finale, le pays Membre ainsi consulté devrait considérer attentivement et avec bienveillance les vues exprimées par le pays requérant et en particulier toutes suggestions quant aux autres moyens de répondre aux besoins ou aux objectifs de l'enquête ou de la procédure en matière de concurrence ;

5. a) Un pays Membre qui considère qu'une ou plusieurs entreprises situées dans un ou plusieurs autres pays Membres se livrent ou se sont livrées à des pratiques anticoncurrentielles, de quelque origine que ce soit, qui portent gravement préjudice à ses intérêts, peut demander d'entrer en consultation avec cet autre ou ces autres pays Membres, étant entendu que la participation à ces consultations ne préjuge en rien toute action en vertu de sa réglementation de la concurrence ni de l'entière liberté de décision finale des pays Membres concernés ;

b) Tout pays Membre ainsi consulté devrait considérer attentivement et avec bienveillance les vues et les faits que peut présenter le pays requérant et, en particulier, la nature des pratiques anticoncurrentielles en cause, les entreprises impliquées ainsi que les effets préjudiciables allégués sur les intérêts du pays requérant ;

c) Le pays Membre consulté qui reconnaît que des entreprises situées sur son territoire se livrent à des pratiques anticoncurrentielles préjudiciables aux intérêts du pays requérant devrait s'efforcer d'obtenir que ces entreprises prennent des mesures correctrices ou devrait prendre lui-même toute mesure correctrice qui lui paraît appropriée, y compris des mesures en vertu de sa réglementation de la concurrence ou des mesures administratives, sur une base volontaire et compte tenu de ses intérêts légitimes ;

6. Sans préjudice d'aucun de leurs droits, les pays Membres parties aux consultations prévues aux paragraphes 4 et 5 devraient s'efforcer de trouver une solution mutuellement acceptable compte tenu de leurs intérêts respectifs ;

7. En cas de conclusion satisfaisante des consultations prévues aux

paragraphes 4 et 5, le pays requérant, en accord et sous la forme convenue avec le ou les autres pays Membres consultés, devrait porter à la connaissance du Comité du droit et de la politique de la concurrence la nature des pratiques anticoncurrentielles visées et du règlement intervenu ;

8. Si aucune solution satisfaisante ne peut être trouvée, les pays Membres concernés devraient, s'ils en sont d'accord, envisager d'avoir recours aux bons offices du Comité du droit et de la politique de la concurrence aux fins de conciliation. Si les pays Membres concernés conviennent d'utiliser d'autres méthodes de règlement, ils devraient, s'ils le jugent approprié, informer le Comité des caractéristiques du règlement qu'ils estiment pouvoir communiquer.

II. RECOMMANDE aux pays Membres de tenir compte des principes directeurs annexés à la présente Recommandation.

III. CHARGE le Comité du droit et de la politique de la concurrence :

1. D'examiner périodiquement les progrès réalisés dans la mise en oeuvre de la présente Recommandation et d'intervenir, périodiquement ou à la demande d'un pays Membre, comme forum pour des échanges de vues sur les questions se rapportant à la Recommandation, étant entendu qu'il ne tirera pas de conclusions sur le comportement de telle ou telle entreprise ou de tel ou tel gouvernement ;

2. D'examiner les rapports soumis par les pays Membres conformément au paragraphe 7 de la section I ci-dessus ;

3. D'examiner les demandes de conciliation soumises par les pays Membres conformément au paragraphe 8 de la section I ci-dessus et de contribuer, par ses avis ou de toute autre manière, au règlement de l'affaire entre les pays Membres en cause ;

4. De faire rapport au Conseil en tant que de besoin sur l'application de la présente Recommandation.

IV. DECIDE que la présente Recommandation et son annexe annulent et remplacent la Recommandation du Conseil du 21 mai 1986 [C(86)44(Final)].

APPENDICE

PRINCIPES DIRECTEURS POUR LES NOTIFICATIONS, LES ÉCHANGES D'INFORMATIONS, LA COOPÉRATION DANS LES ENQUÊTES ET DANS LES PROCÉDURES, LES CONSULTATIONS ET LA CONCILIATION DANS LE DOMAINE DES PRATIQUES ANTICONCURRENTIELLES AFFECTANT LES ÉCHANGES INTERNATIONAUX

Objet

1. Ces principes directeurs ont pour objet de clarifier les procédures établies dans la Recommandation et, ainsi, de renforcer la coopération et de réduire à un minimum les conflits nés de l'application des réglementations de la concurrence. Il est établi que la mise en oeuvre des présentes recommandations reste intégralement soumise aux lois nationales des pays Membres et suppose, dans tous les cas, que les autorités nationales estiment que la coopération pour une affaire spécifique est compatible avec les intérêts nationaux du pays Membre concerné. Les pays Membres pourront souhaiter envisager l'adoption de mesures juridiques conformes à leurs politiques nationales et propres à assurer l'application de la présente Recommandation dans les cas appropriés.

Définitions

2. a) On entend par "enquête ou procédure" toute investigation des faits ou mesure d'exécution officiellement autorisée ou entreprise par une autorité de la concurrence d'un pays Membre en vertu des lois en matière de concurrence de ce pays. En sont cependant exclues (i) l'instruction d'opération effectuée ou des dossiers courants avant qu'il ne soit déterminé, de manière formelle ou informelle, que l'affaire soit anticoncurrentielle ou (ii) des recherches, études ou enquêtes ayant pour objectif d'appréhender la situation économique globale ou les conditions générales propres à un secteur d'activité donné.

b) On entend par "fusion" les fusions, acquisitions, co-entreprises et autres formes de regroupement d'entreprises relevant du champ d'application et des définitions de la réglementation de la concurrence d'un pays Membre en matière de concentrations et de contrôle des fusions.

Notification

3. Les circonstances dans lesquelles une notification d'une enquête ou d'une procédure devrait être faite, conformément au paragraphe I.A.1. de la Recommandation, sont les suivantes :

a) Lorsqu'il est proposé, au moyen d'une demande écrite, de rechercher des informations localisées sur le territoire d'un ou de plusieurs autres pays Membres ;

b) Lorsqu'il s'agit d'une pratique (autre qu'une fusion) exécutée, totalement ou partiellement, sur le territoire d'un ou de plusieurs autres pays Membres, que cette pratique soit purement privée ou qu'elle soit supposée être exigée, encouragée ou approuvée par le gouvernement d'un ou de plusieurs autres pays ;

c) Lorsqu'on peut raisonnablement s'attendre à ce que l'enquête ou la procédure préalablement notifiées aboutissent à des poursuites ou à d'autres mesures d'exécution susceptibles d'affecter des intérêts nationaux importants d'un ou de plusieurs autres pays Membres ;

d) Lorsque sont en cause des mesures correctrices qui imposeraient ou interdiraient des comportements ou des conduites sur le territoire d'un autre pays Membre ;

e) En cas d'enquête ou de procédure en matière de fusion et, en plus des circonstances décrites dans les autres dispositions du présent paragraphe, lorsqu'une partie directement impliquée dans la fusion ou une entreprise contrôlant cette partie est constituée ou organisée selon la législation d'un autre pays Membre ;

f) Dans toute autre situation où l'enquête ou la procédure met en cause d'importants intérêts d'un ou de plusieurs autres pays Membres.

Procédure de notification

4. a) En vertu de la Recommandation, la notification devrait avoir lieu au premier stade de l'enquête ou de la procédure lorsqu'il est manifeste que les circonstances donnant lieu à notification telles que définies au paragraphe 3 sont réunies. Cependant, il existe des cas dans lesquels, une notification à ce stade pourrait porter préjudice à l'enquête ou à la procédure. En pareil cas, la notification et, si elle est demandée, la consultation, devraient intervenir dès que possible et en temps utile pour que puissent être prises en compte les vues exprimées par l'autre pays Membre. Avant qu'une quelconque action administrative ou juridique formelle n'ait été entreprise, le pays qui notifie devrait s'assurer, du mieux possible en fonction des circonstances, que cette notification ne sera pas préjudiciable à ces objectifs.

b) La notification d'une enquête ou d'une procédure devrait être faite par écrit, selon les voies demandées par chaque pays et précisées dans une liste arrêtée et périodiquement mise à jour par le Comité du droit et de la politique de la concurrence.

c) Le contenu de la notification devrait être suffisamment détaillé pour permettre au pays qui reçoit la notification de procéder à une première évaluation de tous les effets probables sur ses intérêts nationaux. La notification devrait mentionner, si possible, les noms des personnes ou entreprises concernées, les activités qui donnent lieu à l'enquête, la nature de l'enquête ou de la procédure et des dispositions juridiques en cause et, le cas échéant, la nécessité de

rechercher des informations localisées sur le territoire d'un autre pays Membre. Dans le cas d'une enquête ou d'une procédure concernant une fusion, la notification devrait également :

i) indiquer l'ouverture d'une enquête ou d'une procédure ;

ii) indiquer la clôture de l'enquête ou de la procédure, avec description des éventuelles mesures correctrices imposées aux parties ou volontairement prises par elles ;

iii) décrire les éléments qui intéressent le pays Membre notifiant, notamment les marchés concernés, les questions de compétence ou les problèmes ayant trait aux mesures correctrices ;

iv) préciser le délai dans lequel le pays Membre notifiant est tenu ou envisage d'agir.

Coordination des enquêtes

5. La coordination des enquêtes concomitantes, telle qu'elle est préconisée au paragraphe I.A.2. de la Recommandation, devrait s'effectuer au cas par cas lorsque les pays Membres concernés conviennent qu'il y va de leur intérêt. Ce processus de coordination ne devra toutefois pas porter atteinte au droit de chaque pays Membre de prendre en toute indépendance une décision fondée sur l'enquête. Cette coordination pourrait, dans le respect des lois nationales des pays concernés, comporter au choix un ou plusieurs des volets suivants :

a) notification des calendriers et programmes retenus pour la prise de décision ;

b) partage d'informations factuelles et d'analyses, dans le respect des législations nationales régissant la confidentialité de l'information et les principes relatifs aux informations confidentielles définis au paragraphe 10 ;

c) sollicitation, dans les circonstances appropriées, des entités faisant l'objet de l'enquête pour qu'elles autorisent les pays coopérant à partager tout ou partie des informations en leur possession, dans la mesure permise par les lois nationales ;

d) coordination des discussions ou des négociations relatives aux mesures correctrices, notamment lorsque celles-ci pourraient impliquer une intervention sur le territoire de plus d'un pays Membre ;

e) dans les pays Membres où la notification préalable des fusions est obligatoire ou autorisée, demande que la notification comporte une déclaration identifiant les notifications également faites ou à faire à d'autres pays.

Aide pour une enquête ou une procédure d'un pays Membre

6. La coopération entre pays Membres sous la forme de la fourniture d'informations relatives aux pratiques anticoncurrentielles, en réponse à une demande d'un pays Membre, conformément au paragraphe I.A.3. de la Recommandation, devrait s'effectuer au cas par cas lorsqu'il en va de l'intérêt

des pays Membres concernés. La coopération pourrait, dans le respect des lois nationales des pays concernés, comporter au choix un ou plusieurs des volets suivants :

a) aide à l'obtention, sur une base volontaire, de renseignements localisés dans le pays Membre qui accorde son aide ;

b) fourniture d'informations factuelles et d'analyses détenues en propre, dans le respect des législations nationales régissant la confidentialité de l'information et les principes relatifs aux informations confidentielles définis au paragraphe 10 ;

c) usage, pour le compte du pays Membre requérant, des prérogatives dont les autorités disposent pour obtenir la production forcée de renseignements sous la forme de témoignages ou de documents, lorsque la législation nationale du pays Membre requis leur donne une telle autorité ;

d) fourniture d'informations relevant du domaine public et concernant le comportement ou la pratique visés. Afin de faciliter l'échange de ces informations, les pays Membres devraient envisager de constituer et de tenir à jour des bases de données sur la nature et les sources de ces informations publiques auxquelles les autres pays Membres pourraient se référer.

7. Lorsqu'un pays Membre apprend l'existence, sur le territoire d'un autre pays Membre, d'une pratique anticoncurrentielle de nature à enfreindre les lois dudit pays, il devrait envisager d'en informer ce pays et lui communiquer autant de renseignements que ses propres lois l'y autorisent, sous réserve des lois nationales régissant la confidentialité de l'information et les principes concernant l'information confidentielle établis dans le paragraphe 10, conformément à d'autres législations nationales applicables et à ses intérêts nationaux.

8. a) Les pays Membres devraient faire preuve de modération et de retenue et tenir compte des règles de fond et des règles de procédure applicables à l'étranger lorsqu'ils exercent leurs pouvoirs d'enquête en vue d'obtenir des renseignements situés à l'étranger.

b) Avant de rechercher des renseignements situés à l'étranger, les pays Membres devraient examiner si les informations nécessaires ne peuvent pas être commodément obtenues à partir de sources situées sur leur territoire.

c) Toute demande en vue d'obtenir des renseignements situés à l'étranger devrait être présentée en termes aussi précis que possible.

9. Des consultations pourront avoir lieu en ce qui concerne le partage des coûts liés à la prestation d'une assistance ou d'une coopération entre les pays Membres.

Confidentialité

10. L'échange d'informations dans le cadre de la présente Recommandation est soumis aux lois des pays Membres participants qui régissent la confidentialité

de ces informations. Un pays Membre peut faire connaître la protection qui devra être accordée aux informations à communiquer et les restrictions qui peuvent s'appliquer pour leur utilisation. Le pays Membre requis pourra légitimement refuser de communiquer des informations confidentielles si le pays Membre requérant ne peut respecter ces exigences. Le pays Membre recevant les informations devra prendre toutes les mesures raisonnables pour faire respecter la confidentialité des informations et les restrictions à leur utilisation dont a fait état le pays Membre qui les a communiquées et, en cas de violation de la confidentialité des informations ou des restrictions à leur utilisation, il devrait notifier cette violation au pays Membre qui a communiqué les informations et prendre les mesures appropriées pour remédier aux effets de la violation.

Consultations entre pays Membres

11. a) Le pays qui notifie une enquête ou une procédure devrait conduire celles-ci, dans la mesure du possible et compte tenu des contraintes d'ordre juridique et pratique relatives aux délais, de façon à permettre au pays qui a reçu la notification de demander des consultations informelles ou de faire connaître son point de vue sur l'enquête ou la procédure.

b) Les demandes de consultations prévues aux paragraphes I.B.4. et I.B.5. de la Recommandation devraient être faites aussitôt que possible après la notification et les explications relatives aux intérêts nationaux affectés devraient être fournies d'une façon suffisamment détaillée pour qu'elles puissent être pleinement prises en considération.

c) Lorsqu'il y a lieu, le pays Membre qui a reçu une notification devrait envisager de prendre des mesures correctrices en application de sa propre législation pour donner suite à la notification.

d) Tous les pays concernés par les consultations devraient prendre pleinement en compte les intérêts mis en avant et les points de vue exprimés lors des consultations, de façon à éviter ou à réduire au minimum les conflits possibles.

Conciliation

12. a) S'ils sont d'accord pour recourir aux bons offices du Comité à des fins de conciliation, conformément au paragraphe I.B.8. de la Recommandation, les pays Membres devraient informer le Président du Comité et le Secrétariat de leur intention de faire usage de la procédure de conciliation.

b) Le Secrétariat devrait continuer d'établir une liste de personnes disposées à agir comme conciliateurs.

c) La procédure de conciliation devrait être arrêtée par le Président du Comité en accord avec les pays Membres concernés.

d) Les conclusions qui pourront être tirées à l'issue de la conciliation seront dépourvues d'effets obligatoires à l'égard des pays Membres concernés et la procédure de conciliation sera confidentielle, sauf si les pays Membres concernés en conviennent autrement.

Non classifié **CCNM/GF/COMP(2001)1**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **10-Oct-2001**

Français - Or. Anglais

CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES

CCNM/GF/COMP(2001)1
Non classifié

Forum mondial de l'OCDE sur la concurrence

CONTRÔLE DES FUSIONS ET COOPÉRATION INTERNATIONALE

-- Note du Secrétariat --

Le présent document donne des informations de base et propose des questions à examiner lors des débats concernant les fusions qui se dérouleront dans le cadre du Forum mondial sur la concurrence, le 18 octobre 2001.

JT00114296

Français - Or. Anglais

FORUM MONDIAL DE L'OCDE SUR LA CONCURRENCE
CONTROLE DES FUSIONS ET COOPERATION INTERNATIONALE

(Note du Secrétariat)

Introduction

1. Le Forum mondial de l'OCDE sur la concurrence, le 18 octobre 2001, sera consacré notamment au contrôle des fusions et à la coopération internationale en la matière. Même si le débat est censé porter principalement sur la coopération dans le domaine des enquêtes sur les fusions transnationales, cette session permettra aussi d'aborder les questions relatives à la mise en place d'un programme d'examen des fusions. Les contributions soumises spécialement pour cette session seront mises sur OLIS et sur le site web du Forum dès réception.

2. Le débat organisé dans le cadre du Forum sur la coopération internationale dans le domaine des fusions s'appuiera sur les travaux d'une table ronde consacrée au même thème organisée le 29 mai 2001 par le Groupe de travail N° 3. A l'intention des Membres et des Invités au Forum, la présente note donne un très bref résumé de la documentation soumise précédemment et recense un certain nombre de questions qui n'ont peut-être pas été explorées complètement en mai ou qui méritent un examen plus approfondi dans le cadre du Forum. A titre de référence pour les Invités, le Secrétariat est en train d'établir un document de travail contenant la documentation pertinente qui se rapporte à cette réunion, notamment (1) une note du Secrétariat présentant les questions essentielles, (2) six contributions soumises par des Membres et (3) un aide-mémoire résumant les débats.

La table ronde précédente

3. Le document sur les questions à examiner préparé pour la réunion de mai soulève plusieurs questions intéressant la coopération internationale dans le domaine des enquêtes sur les fusions, notamment les types de transactions et de problèmes pour lesquels la coopération est avantageuse, la méthodologie de la coopération en matière de fusions, les moyens de faire participer les parties à la fusion au processus de coopération et les questions relatives à l'établissement de relations spécifiques de coopération bilatérale.

4. Le document note que les fusions « horizontales », ou celles qui s'opèrent entre parties qui se livrent concurrence sur un marché donné, sont celles qui donnent le plus couramment lieu à des enquêtes des autorités de contrôle de la concurrence, tant au plan national qu'au plan international. Les parties peuvent coopérer sur n'importe quelle question, ou presque, présentant de l'intérêt dans le cadre d'une enquête sur une fusion, mais l'un des domaines où la coopération paraît être la plus fructueuse à en juger par les affaires récentes est le stade des mesures correctrices, où les autorités nationales chargées de la concurrence coordonnent leurs décisions concernant les démantèlements afin d'assurer la cohérence des résultats dans les différents pays.

5. La coopération entre organismes de contrôle de la concurrence est habituellement informelle. Il importe d'engager le processus dès que possible au cours de l'enquête. Les règles de protection des renseignements confidentiels interdisent l'échange d'une grande partie des informations non publiques obtenues par les autorités chargées de la concurrence au cours de leur enquête, mais les organismes qui coopèrent peuvent examiner des informations dans le cadre de « procédures de délibération » portant sur leurs analyses et leurs conclusions au sujet de certains aspects de l'affaire, comme la définition du marché, par exemple, et c'est ce qu'ils font.

6. Lorsque plusieurs autorités de contrôle de la concurrence enquêtent sur une fusion, il est dans l'intérêt commun des parties à la fusion et des autorités que l'enquête soit achevée rapidement et que les résultats soient cohérents. Aussi les parties à la fusion sont-elles souvent disposées à consentir à l'échange d'informations autrement confidentielles par des organismes qui coopèrent, accordant des dérogations aux règles de confidentialité. L'obtention de ces dérogations peut être un élément décisif pour la réussite de l'initiative de coopération. Les parties à la fusion se montrent parfois méfiantes à l'égard de l'octroi de dérogations, mais les autorités nationales de contrôle de la concurrence observent que la protection contre la divulgation non autorisée de renseignements confidentiels a toujours été excellente jusqu'à présent. Différents types de dérogations sont accordées par les parties, en fonction de chaque cas.

7. Enfin, le document sur les questions à examiner passe en revue les différents types de relations de coopération qui se sont développées ces dernières années. La relation de coopération bilatérale les plus remarquable et qui donne les meilleurs résultats est celle qui s'est établie entre la Commission européenne et les Etats-Unis. Il y a cependant plusieurs exemples de coopération fructueuse entre d'autres pays, menée souvent sur une base ad hoc, cas par cas. On peut signaler le développement potentiellement important d'une relation entre les trois pays nordiques (le Danemark, l'Islande et la Norvège) qui ont récemment signé un accord officiel prévoyant l'échange d'informations confidentielles entre leurs autorités de contrôle de la concurrence. Cet accord, qui s'appuie sue les lois existantes des trois pays autorisant ces échanges, pourraient renforcer notablement la capacité des pays signataires de coopérer efficacement en matière d'enquêtes sur les fusions.

8. Les contributions soumises par les pays pour la table ronde portent sur des cas particuliers de coopération avec une ou plusieurs autre(s) autorités(s) de contrôle, décrivant les moyens par lesquels la coopération s'est établie. Les documents décrivent des relations spécifiques de coopération bilatérale qui se sont créées ces dernières années. Ils énumèrent les facteurs qui contribuent à la réussite des enquêtes sur les fusions menées dans le cadre d'une coopération, les enseignements tirés des affaires traitées dans le passé, et certains d'entre eux formulent des propositions visant à renforcer encore la coopération internationale dans le domaine des enquêtes sur les fusions.

9. L'aide-mémoire présente de façon détaillée les débats de la table ronde. Plusieurs thèmes ont été développés. Le choix du moment est important pour la réussite de la coopération internationale en matière de contrôle des fusions. Les autorités chargées de la concurrence qui décident de coopérer doivent entamer leurs discussions le plus tôt possible au cours du processus. Si l'échange de renseignements confidentiels est parfois important, il n'est pas indispensable à une coopération efficace car les pays peuvent échanger et examiner les informations qui sont à la disposition du public ainsi que leurs théories et leurs conclusions, par exemple au sujet de la définition du marché et des mesures correctrices. Enfin, la table ronde a permis d'établir que, si la structure de la coopération -- accords bilatéraux ou accords internationaux multilatéraux -- peut être utile pour fixer un cadre de travail, il est beaucoup plus important que les autorités de contrôle de la concurrence développent entre elles des relations de travail productives, nourries par des contacts informels fréquents entre leurs professionnels de tous niveaux.

Questions pouvant faire l'objet d'un examen approfondi

10. Au cours des débats du Forum sur la coopération dans le domaine des fusions transnationales, il est proposé d'examiner les questions suivantes :

- *Des relations de coopération internationales tendent à se développer au fil du temps, entre des pays qui, le plus souvent, sont touchés conjointement par les mêmes fusions. Les relations internationales les plus actives entre pays Membres de l'OCDE sont les suivantes : CE-EU, pays nordiques, Canada-*

EU, Australie-Nouvelle-Zélande, et entre divers Etats membres de l'UE. Quels sont les facteurs qui contribuent au développement de ces relations, par exemple la taille de l'économie, la proximité géographique, l'importance des échanges commerciaux ? Quelles autres relations de travail se sont développées entre les pays dans le monde entier ?

- *Presque tous les cas examinés lors de la table ronde de mai étaient des cas de coopération entre deux pays ou, le plus souvent, entre quelques pays. Cependant, certaines fusions peuvent toucher de nombreux pays. Quelques-unes ont fait l'objet d'enquêtes menées par de nombreuses autorités de contrôle de la concurrence, simultanément ou à des périodes très proches. La fusion Coca-Cola/Cadbury/Schweppes en est peut-être le meilleur exemple récent. Y en a-t-il eu d'autres ? Quelles sont les aspects particuliers de ces transactions qui affectent la coopération ? Comment peut-on améliorer simultanément la coopération entre de nombreux pays ?*

- *La table ronde de mai a établi que la participation volontaire des parties à une fusion est importante pour la réussite de l'effort de coopération, cette participation consistant le plus souvent à accorder des dérogations aux règles de confidentialité. Le secteur privé s'exprime préoccupé au sujet de l'octroi de dérogations dans des cas où les parties ne sont pas certaines de la capacité du pays destinataire de protéger les informations confidentielles. Que s'est-il passé jusqu'à présent lorsqu'une dérogation a été demandée par ou pour un pays en développement ou un pays qui n'exerce que depuis peu un contrôle sur les fusions ? Que peut-on faire pour donner l'assurance aux parties que les informations seront protégées dans ces cas-là ?*

- *Il peut y avoir coopération lorsqu'un seul pays a des doutes concernant la concurrence au sujet d'une fusion, par exemple lorsque le pays qui décide d'enquêter demande l'aide d'un autre pays afin d'obtenir des éléments de preuve ou d'analyser une affaire ou une question. Cette aide peut être particulièrement utile pour les pays en développement ou les pays qui sont débutants en matière de contrôle des fusions. Comment ce type de coopération a-t-il fonctionné jusqu'à présent ? Que peut-on faire pour la renforcer dans l'avenir ?*

Documentation établie pour la table ronde précédente

11. Les documents qui suivent, établis pour la table ronde précédente, seront reproduits dans un document de travail [CCNM/GF/COMP/WD(2001)1] :

- Document du Secrétariat sur les questions à examiner DAFFE/CLP/WP3(2001)5
- Documents soumis par les pays

Canada	DAFFE/CLP/WP3/WD(2001)20
République tchèque	DAFFE/CLP/WP3/WD(2001)21
Commission européenne	DAFFE/CLP/WP3/WD(2001)25
Allemagne	DAFFE/CLP/WP3/WD(2001)19
Norvège	DAFFE/CLP/WP3/WD(2001)22
Etats-Unis	DAFFE/CLP/WP3/WD(2001)23

- Aide-mémoire des débats DAFFE/CLP/WP3/M(2001)2/ANN2/REV1

Non classifié **CCNM/GF/COMP(2001)5**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **14-Nov-2001**

Français - Or. Anglais

CENTRE POUR LA COOPERATION AVEC LES NON-MEMBRES
DIRECTION DES AFFAIRES FINANCIERES, FISCALES ET DES ENTREPRISES

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Forum mondial de l'OCDE sur la concurrence

CONTRIBUTIONS DES INVITÉS AU FORUM : DESCRIPTIONS DE CAS DE FUSIONS (Session IV)

-- Note du Secrétariat--

Cette note est soumise POUR INFORMATION au titre de la session V de l'ordre du jour du Forum.

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CONTRIBUTIONS DES INVITÉS AU FORUM : DESCRIPTIONS DE CAS DE FUSIONS

1. La présente note destinée à tous les participants une brève description des contributions des invités dans le domaine des cas de fusions. Ces cas ne seront pas officiellement présentées dans le cadre du Forum, mais pendant les débats sur les fusions de la session V, certains participants souhaiteront peut-être se référer à leurs propres cas ou s'informer sur celles des autres.

Bulgarie

2. La Bulgarie a commenté les dispositions relatives aux opérations de concentration figurant dans la Loi sur la protection de la concurrence et présenté deux études de cas. La Commission de la protection de la concurrence (CPC) autorise les concentrations qui ne créent pas ou ne renforcent pas une position dominante. L'autorisation peut être également délivrée si la concentration a pour but de moderniser la production ou l'ensemble de l'économie, d'améliorer les structures de marché, d'attirer les investisseurs, d'accroître la compétitivité sur les marchés extérieurs, de créer de nouveaux emplois et de mieux satisfaire les intérêts des consommateurs. Lorsqu'elle examine un projet de concentration, la CPC cherche à savoir si les avantages l'emportent sur l'effet préjudiciable à la concurrence sur le marché pertinent. Un cas de fusion présenté dans la contribution concernait l'acquisition de 5 % du capital d'une entreprise et le deuxième cas portait sur une acquisition qui a été autorisée en dépit de l'importance des parts de marché résultant de l'opération, en raison d'une forte concurrence sur le marché et de bénéfices économiques attendus de cette transaction. Dans ces deux études de cas, les acquéreurs étaient étrangers, mais cela n'a apparemment pas posé de problèmes transnationaux.

- Unicredo Italiano SpA a proposé d'acquérir 93 %, et allianz AG 5 % du capital de Bulbank Joint Stock Company, une banque bulgare. Allianz était déjà active sur le marché bancaire bulgare car elle contrôlait une autre banque, ce qui n'était pas le cas d'Unicredo. C'est Allianz qui a notifié la transaction. La CPC a établi que son projet d'acquisition de 5 % du capital n'entrait pas dans le champ d'application de la loi sur les contrôles des fusions.

- Deux compagnies d'assurance, T.B.I. Holding H.B. Ltd, Holland (TBI) et DZI 2000 Ltd, ont notifié une proposition d'opération de concentration. Un consortium des deux entreprises (détenu à 99 % par TBI et à 1 % par DZI) prévoyait d'acquérir 67 % du capital de DZI Ltd. Une société du groupe économique de TBI était le seul prestataire de services habilité à établir des cartes de séjour en Bulgarie. La CPC a calculé que la part globale de marché après la concentration serait de 50.64 % mais a considéré que la concurrence était forte sur le marché pertinent. Après avoir examiné le programme d'investissement présenté par le consortium, la CPC a conclu que l'opération de concentration proposée pourrait avoir des effets économiques positifs. Elle contribuerait à la modernisation de l'entreprise rachetée, à l'amélioration de la qualité du service et à l'accroissement de la compétitivité de DZI. La commission a également accordé de l'importance à l'engagement pris par TBI de garder, avec un minimum de licenciements, les effectifs de l'entreprise rachetée.

Chine

3. La Chine n'a fait aucune contribution concernant les fusions ; sa législation relative à la concurrence ne prévoit pas de contrôle des fusions.

Estonie

4. L'Estonie a présenté les dispositions de sa législation sur la concurrence applicables aux fusions et des statistiques sur leur mise en application, mais n'a pas proposé d'études de cas spécifiques de fusion. La loi sur la concurrence interdit les concentrations qui ont pour effet la création ou le renforcement d'une position dominante, entraînant une restriction significative de la concurrence sur le marché pertinent. Lorsque le chiffre d'affaires global à l'échelle mondiale des parties à un projet d'opération de concentration dépasse un certain seuil, l'opération doit être notifiée à l'Autorité estonienne de la concurrence. En 2000, l'Autorité estonienne de la concurrence a examiné 29 notifications de concentration.

Indonésie

5. L'Indonésie n'a pas fait de contribution concernant le contrôle des fusions.

Kenya

6. Le Kenya a situé le contrôle des fusions dans son contexte institutionnel dans le tour d'horizon et a présenté trois études de cas. « Le principal objectif de la Loi sur la concurrence du Kenya est d'encourager la concurrence sur le marché national en.. réglementant les concentrations de puissance économique injustifiées… » Plus précisément, il est prévu dans la Loi que le ministre surveille en permanence la structure de la production et de la distribution de biens et services afin de déterminer s'il existe des concentrations de pouvoir économique dont l'effet négatif sur l'économie l'emporte sur les avantages sur le plan de l'efficience. Deux des trois études de cas présentées par le Kenya impliquent des fusions transnationales qui auraient eu un effet négatif sur la concurrence au Kenya. La troisième a trait à une série de rachats d'entreprises par une entreprise étrangère qui a intégré verticalement le secteur.

- En janvier 2000, Agip a décidé de vendre à Shell (et British Petroleum) toutes ses participations dans ses filiales situées dans cinq pays africains (le Kenya, l'Ouganda, l'Erythrée, l'Ethiopie et la Côte d'Ivoire). La Commission a contacté les agences gouvernementales concernées et plusieurs intervenants dans le secteur du pétrole, mais il n'est pas sûr qu'elle ait cherché à obtenir des informations à l'étranger. Elle a estimé que l'acquisition proposée aurait un effet tout à fait préjudiciable à la concurrence sur le plan de la production et de la fourniture de gaz de pétrole liquéfié et de l'utilisation de bras de chargement sur rails à Mombassa et à Nairobi. Les parties ont été invitées à expliquer comment les équipements de manutention du GPL et des bras de chargement sur rails d'AGIP pourraient être restructurés après l'acquisition afin de minimiser les effets anticoncurrentiels. Le ministre des Finances a autorisé l'acquisition sous réserve de la cession des équipements de manutention du GPL et des bras de chargement dans l'année suivant l'acquisition.

- Le Kenya a trois entreprises de fabrique de ciment -- Bamburi Cement Ltd, qui fournit 50 % de la consommation intérieure, EAPCC, qui fournit 40 %, et ARM qui fournit 10 %. En juin 2000, Blue Circle Industries Plc (BCI) a demandé l'autorisation d'acquérir des participations dans deux des entreprises. Bamcem est une société holding détenue par BCI (40 %), La Farge

(40 %) et Costal (20 %). Les enquêtes ont établi qu'après l'acquisition, Bamcem détiendrait 72 %, BCI 52 % et La Farge 21 % dans Bamburi, EAPCC et ARM. La transaction donnerait donc à Bamcem et ses commettants une forte influence sur l'ensemble des trois cimenteries au Kenya. Le ministre des Finances a donc rejeté la demande d'autorisation.

- Avant 1995, Coca Cola, Pepsi et Schweppes se faisaient concurrence pour la fourniture de boissons gazeuses au Kenya. Fin 1995, Coca Cola vendait 95 % des boissons gazeuses au Kenya et la vaste majorité des embouteilleurs embouteillaient du Coca Cola. Coca Cola International a décidé de reprendre le contrôle de chacune des huit usines d'embouteillage de Coca Cola au Kenya par le biais de sa filiale Coca Cola SABCO. En septembre 1997, Coca Cola SABCO a demandé l'autorisation d'acquérir Flamingo Bottlers de Nakuru. Suite à une enquête, le ministre des Finances a approuvé cette demande sous certaines conditions. Coca Cola SABCO a fait appel de ces conditions, et l'enquête se poursuit.

Lettonie

7. La Lettonie a présenté deux études de cas de fusion n'impliquant à l'évidence que des entreprises nationales. La Loi sur la concurrence stipule que les fusions doivent être notifiées et examinées par le Conseil de la concurrence. En 2000, le Conseil a examiné trois propositions de fusion. L'une impliquait une partie détenant 4 % de parts de marché. L'autre fusion aboutissait à renforcer une position dominante mais impliquait des parties qui n'atteignaient pas le seuil de notification de fusion.

- « Staburadze » a acquis une influence décisive sur « Laima ». Ces entreprises fabriquent et vendent divers produits de confiserie en Lettonie. Le marché pertinent a été défini comme celui de la vente de caramels et de dragées en Lettonie. Une partie à la fusion détenait une part de marché de 4 % sur le marché pertinent. Le Conseil de la concurrence a reçu ces informations des parties à la fusion, de leurs concurrents et de leurs fournisseurs, mais il n'est pas certain qu'elle ait cherché à obtenir des informations à l'étranger. Le Conseil a conclu que la fusion augmenterait la compétitivité sur le marché local et international et stimulerait la production à l'exportation. Le Conseil n'a pas trouvé de circonstance permettant de conclure à un effet préjudiciable de cette opération pour les consommateurs. L'opération de fusion n'accroît pas de façon significative la concentration sur le marché pertinent. D'autres intervenants interrogés dans le cadre du processus d'évaluation ont estimé que la fusion n'accroîtrait pas le pouvoir de marché des parties à la fusion. Le Conseil de la concurrence a donc conclu que les avantages potentiels de l'opération l'emportaient sur les effets préjudiciables et a donné son autorisation.

- Le Conseil de la concurrence a reçu une notification de la vente de 85 % du capital de « Preses Apvienîba » à « Narvesen Beltija ». Le Conseil a demandé et reçu les informations supplémentaires de la part des parties, des autres intervenants sur le marché, de l'Association lettone des éditeurs de presse, et de nombreux éditeurs de journaux et de périodiques dans les zones rurales. Sur la base de cette enquête, le Conseil a établi : 1) que « Preses Apvienîba » occupait une position dominante dans la distribution de détail et de gros des journaux et des périodiques ; 2)que « Narvesen Beltija » était active dans la distribution de détail des journaux et des périodiques ; 3) que la distribution de détail et de gros étaient des produits distincts ; 4) que « Preses Apvienîba » avait la possibilité de passer des contrats d'achat et de vente à des conditions plus favorables que ses concurrents et 5) que le chiffre d'affaires global des deux entreprises l'année précédente représentait moins de 25 millions de lati. Le Conseil a conclu que la transaction renforcerait le pouvoir de marché de « Preses Apvienîba ». Toutefois, le Conseil a également conclu que les parties n'étaient pas obligées

de notifier la fusion puisque le chiffre d'affaires global était inférieur à 25 millions de lati. En raison des effets potentiellement préjudiciables à la concurrence, le Conseil assurera le suivi des activités de l'entreprise fusionnée.

Maroc

8. Le Maroc n'a pas fait de contribution concernant le contrôle des fusions.

Pérou

9. Le Pérou n'a pas fait de contribution concernant le contrôle des fusions.

Afrique du Sud

10. L'Afrique du Sud a fait une présentation statistique de sa procédure d'examen des fusions et des descriptions de plusieurs opérations de fusion. En 2000-2001, la Commission de la concurrence a reçu 407 notifications de fusion. La Commission a présenté des examens de deux fusions et d'une co-entreprise. Sur ces trois opérations, deux impliquaient des entreprises étrangères ayant des avoirs en Afrique du Sud. Le tribunal a prononcé deux décisions sur les fusions nationales, l'une concernant une fusion verticale et l'autre la fusion de détaillants d'une vaste gamme de produits.

- Glaxo Wellcome et SmithKline Beecham ont proposé de fusionner. Des problèmes de concurrence se sont posés dans les segments du secteur privé pour deux catégories thérapeutiques, les antibiotiques topiques (D6A) et les anti-viraux, à l'exception des anti-HIV (J5B). Les parties à la fusion sont convenus de créer des produits spécifiques dans ces catégories thérapeutiques, dans des conditions précisées dans l'accord. Ceci a permis de régler les problèmes de concurrence et la fusion a été approuvée.

- Deux entreprises de sucre, Tongaat-Hulett Group et Transvaal Suiker Beperk ont proposé de fusionner. La réglementation relative au secteur de l'industrie du sucre va être largement modifiée afin d'encourager la concurrence sur le marché intérieur du sucre. L'opération de fusion envisagée a donc été évaluée à la fois sous l'angle de son effet dans le cadre des réglementations en vigueur à l'heure actuelle, où la concurrence et les incitations à la concurrence sont limitées, voire absentes, et dans le cadre des conditions potentielles futures de la concurrence. La Commission s'est opposée à la fusion.

- Trois grandes compagnies pétrolières, Shell, BP et Caltex et Trident Logistics ont proposé de former une co-entreprise. La proposition a ensuite été retirée. Les trois compagnies pétrolières voulaient utiliser Trident pour gérer, passer des contrats et fournir un soutien logistique dans le domaine de la fourniture et de la distribution et dans celui des services associés au raffinage, à l'entreposage et à la manutention concernant les dépôts, les oléoducs et les transports ferroviaires, maritimes et routiers. La Commission a estimé que la concurrence serait fortement diminuée sur les marchés des échanges de produits et des services d'accueil.

- Schumann Sasol (Afrique du Sud) (SCHS) a proposé d'acheter Price's Daelite (PD). Cette acquisition remettrait les parties dans la situation dans laquelle elles se trouvaient avant 1995. PD est fortement endetté vis-à-vis de SCHS. Les parties et la Commission de la concurrence

sont convenues que les deux marchés pertinents étaient le marché de la cire (que fournit SCHS) et le marché des bougies (que fournit PD). Elles sont également convenues que le marché géographique pertinent était l'Afrique du Sud. La substituabilité des différents types de cires et de leurs associations pour fabriquer des bougies a été examinée. Les parties à la fusion détenaient respectivement 75 % et 42 % de leurs marchés respectifs. SCHS est le fournisseur exclusif de cire aux fabricants de bougies avec une part globale de marché de 66 %. Les droits d'importation sur les bougies de 20 % limitent le total des importations de bougies (il n'y a pas de droits sur la cire). Il y a des produits de substitution aux bougies (lampes à huile et électricité) mais dans la pratique, une grande partie de la population, surtout la plus pauvre, utilise des bougies pour s'éclairer. Le tribunal a rejeté la fusion au motif qu'elle était anticoncurrentielle, jugeant que les conditions du marché étaient réunies « pour une entrée concurrentielle sur le marché de la cire à bougies », et que la fusion accentuera les obstacles à l'entrée en supprimant un gros acheteur, PD, de la liste des acheteurs potentiels de cire. Il a également établi que la transaction accroîtrait la position dominante de la société PD sur le marché de la bougie. Le tribunal a rejeté les arguments des parties, a examiné l'effet de la fusion sur la compétitivité à l'exportation, sur les petites entreprises et sur l'emploi, faisant observer que ce sont les consommateurs les plus pauvres qui consomment les bougies . Cette opération de fusion allant à l'encontre de l'intérêt public n'a pas été autorisée.

- Le groupe JD voulait prendre le contrôle d'Ellerines Holdings (EH). Ces entreprises font partie des détaillants d'Afrique du Sud les plus connus avec plusieurs centaines de magasins chacun. Définir le marché des produits concernés a prêté à controverse, la Commission estimant qu'il s'agissait d'un marché de produits consolidé (les distributeurs de meubles et d'appareils ménagers s'adressant à des catégories de consommateurs spécifiques) et les parties jugeant qu'il s'agissait d'un marché de produits segmenté (ameublement, literie, appareils électro-ménagers, audiovisuels et autres produits n'entrant pas dans le champ de la présente analyse). Il n'y avait pas de consensus non plus à propos des marchés géographiques pertinents : plusieurs marchés locaux ou le marché national. Il a été décidé d'un commun accord que le problème de concurrence se limitait aux ventes à crédit. Le tribunal, se référant au cas *Federal Trade Commission v. Staples et Brown Shoe v. United States*, a utilisé des indices pratiques et établit que le mode de distribution de détail utilisé par JD et EH « magasins d'ameublement » évinçait du marché des distributeurs à faible marge. Ces indices pratiques étaient la localisation des magasins, les stratégies de prix, l'approche vis-à-vis du crédit et la gamme des produits proposés. Le niveau des services aux consommateurs a également été mentionné. Le tribunal a en outre établi que les parties fixaient leurs prix et leurs conditions commerciales à l'échelle nationale, sans tenir compte de la concurrence émanant de détaillants indépendants locaux. Le tribunal a donc considéré que le marché pertinent était la vente de produits d'ameublement et d'équipements à crédit aux consommateurs de la catégorie LSM3-5 (évaluation du pouvoir d'achat, profil du consommateur en fonction de différents critères de niveau de vie) par le biais de chaînes nationales de magasins d'ameublement. Le tribunal a examiné différents aspects de la structure du marché, la nature de la concurrence sur le marché et les obstacles à l'entrée, et a conclu que l'opération de fusion réduirait fortement la concurrence sur le marché pertinent. Le tribunal a examiné une proposition de cession sur laquelle la Commission et les parties s'étaient mises d'accord, mais a jugé qu'elle ne répondait pas aux préoccupations soulevées.

Roumanie

11. La contribution de la Roumanie décrit deux dispositions du droit de la concurrence applicables aux fusions, présente des statistiques sur le contrôle des fusions et décrit deux séries de fusions. La Loi sur la concurrence interdit les concentrations économiques qui ont pour effet de créer ou de renforcer une position dominante, et conduisent ou sont susceptibles de conduire à une restriction, à une prévention ou une distorsion de la concurrence sur le marché roumain ou sur une partie de ce dernier. En 2000, le Conseil de la concurrence a analysé 237 opérations de concentration économique, ce qui représente une forte progression par rapport à 1999 en termes absolus, et par rapport à d'autres types d'opérations soumises à autorisation. Sur les 7 décisions faisant suite à des enquêtes sur des notifications de concentration en 2000, deux ont été des autorisations, trois des autorisations soumises à condition, et deux des rejets. Lorsque le chiffre d'affaires des parties impliquées dans une proposition de concentration économique dépasse un certain seuil, la concentration doit être notifiée au Conseil.

- Tubman (International) Ltd a acquis environ 70 % du capital social de SC Silcotub SA Zalau, SC Laminorul SA Braila et SC Petrotub SA Roman. Le Conseil de la concurrence a autorisé les deux premières acquisitions, parce que les entreprises ne fournissaient pas le même marché, mais a rejeté la troisième. La troisième acquisition, si elle avait été autorisée, aurait donné à l'entreprise la possibilité d'avoir une part du marché pertinent (tubes sans soudure) de plus de 76 %. Tubman aurait donc occupé une position dominante sur le marché pertinent, ce qui aurait entraîné une réduction significative de la concurrence et la possibilité d'évincer les concurrents. D'autant que SC Petrobub SA Roman est le seul producteur de tubes sans soudure, ce qui aurait permis d'avoir recours à des subventions croisées. En conséquence le Conseil de la concurrence s'est opposé à cette opération de concentration économique. La décision a fait l'objet d'un appel auprès de la Cour d'appel de Bucarest, qui l'a confirmée. L'arrêt de la Cour d'Appel n'a pas fait l'objet d'un recours devant la Cour Suprême.

- En 2001, le Conseil de la concurrence a enquêté sur le rachat par la Compagnie financière Michelin de Tofan Holding SA. Tofan est un producteur roumain distributeur national de pneus. Les marchés pertinents ont été déterminés comme ceux des pneus de voitures et des pneus de camions. Cette opération de concentration aurait donné à Michelin une part de marché de 58.91 % sur les pneus de voitures et de 56.50 % sur les pneus de camions. Considérant que les droits de douane devraient baisser, en vertu d'accords auxquels la Roumanie est partie ; que l'accès au marché du pneu est facilité par le manque d'obstacles à l'entrée ; que l'opération de concentration permettrait de remplir des conditions de l'article 14(2) a), b), c) de la Loi sur la concurrence ; et que les consommateurs bénéficieront d'une baisse des prix réels du fait de ces investissements, le Conseil de la concurrence a autorisé la concentration sous certaines conditions.

Slovénie

12. La Slovénie a décrit sa procédure de contrôle des fusions dans le tour d'horizon et plus généralement évoqué des opérations de concentration dans les secteurs de la distribution de détail, des médias et de l'industrie chimique. Les concentrations doivent être notifiées dans les délais sur la base du chiffre d'affaires en Slovénie ou de la part de marché en Slovénie. L'Autorité de la concurrence cherche à savoir si l'opération de concentration est susceptible de créer ou de renforcer une position dominante qui porterait préjudice à l'efficacité ou au développement de la concurrence. L'efficacité de la concurrence efficace est évaluée en fonction des caractéristiques du marché, telles que sa structure, l'ouverture aux nouveaux entrants, et le comportement des entreprises et des autres participants sur le marché et leur incidence. Les effets des concentrations sont analysés sur les marchés pertinents et les marchés

géographiques. En 2000, l'Office de protection de la concurrence a publié 39 décisions relatives à des notifications de concentration. Il a jugé que 4 opérations ne relevaient pas du champ d'application de la loi, que 31 opérations étaient conformes au droit de la concurrence et que 4 seraient autorisées sous certaines conditions.

- Les concentrations dans le secteur de la distribution de détail impliquaient une série d'acquisitions par une entreprise, ainsi que d'autres consolidations de concurrents. Les autres opérations de concentration concernaient l'édition, la distribution de livres, de papier à lettres et de matériel de bureau, et la télédiffusion. Les concentrations dans le secteur de l'industrie chimique ne faisaient pas intervenir des concurrents directs.

Le Taipeh chinois

13. Le Taipeh chinois a décrit sa procédure de contrôle des fusions dans le tour d'horizon et présenté une étude de cas de fusion. De manière générale, la Loi sur la concurrence autorise les fusions, celles qui dépassent un certain seuil étant soumises à l'autorisation préalable de la Commission de la concurrence. De 1992 à 2000, la Commission de la concurrence a reçu 4832 demandes de fusion. La fusion décrite implique deux sociétés de télévision câblées nationales (CATV).

- Ch'un Chien CATV Co, Ltd. a demandé l'autorisation de reprendre la majorité des actifs et des opérations de Wei Da CATV Co. Ltd. Les parties à la fusion sont concurrentes sur le même secteur du marché. L'entreprise fusionnée aurait eu davantage d'abonnés que prévu lorsque les zones d'exploitation étaient attribuées aux opérateurs de CATV. L'enquête a établi que la télédiffusion directe par satellite n'était pas une bonne solution de rechange pour CATV en raison des différences de type , de nombre de chaînes et de coût. La fusion n'aurait pas avantagé des prestataires de contenu en amont ou les consommateurs, et elle n'aurait pas encouragé les opérations intersectorielles. L'entrée a été jugée lente, trois ans ou plus. Il a été considéré que la transaction n'entraînait pas d'avantages économiques importants et impliquait une restriction de la concurrence. La Commission a rejeté la transaction.

Thaïlande

14. La Thaïlande fait une description de sa législation applicable aux fusions et décrit un cas de fusion d'entreprises nationales créant une situation de monopole. Toute fusion qui peut entraîner un pouvoir monopolistique et réduire la concurrence est interdite par la loi, sauf si la Commission de la concurrence l'autorise au motif qu'elle est nécessaire dans le secteur d'activité pertinent et qu'elle est avantageuse pour l'économie.

- Deux sociétés de télévision câblées ont fusionné pour devenir le seul opérateur de télévision câblée (CATV). La société fusionnée, en difficulté financière en raison de la dépréciation du baht, a augmenté les tarifs de ses services et réduit le nombre des programmes. L'ajustement des services et des frais d'abonnement mensuels relève de la compétence de l'Organisme thailandais chargé de la communication, qui est aussi l'institution qui accorde les concessions aux opérateurs de chaînes câblées. La Commission de la concurrence a demandé au secrétariat de la concurrence de déterminer dans quelle mesure la société fusionnée était une entreprise publique et a demandé à l'Organisme thailandais chargé de la communication de surveiller la structure des prix et des offres de services de la société afin de trouver davantage de solutions de rechange pour les consommateurs. Si la société fusionnée est considérée

comme étant détenue par l'État, elle n'entrera plus dans le champ d'application de la Loi sur la concurrence.

Ukraine

15. L'Ukraine a fait une contribution sur la coopération internationale, une partie traitant des fusions et des statistiques sur le contrôle des fusions, et présenté deux études de cas d'acquisition par une entreprise étrangère d'entreprises nationales. A propos de la coopération internationale, l'Ukraine a indiqué qu'une coopération internationale multilatérale était indispensable pour mettre au point des règles de concurrence internationales applicables aux fusions. Cette question fait l'objet d'une étude approfondie à l'heure actuelle. Les mécanismes de règlement des différents sont nécessaires dès le départ.

La loi ukrainienne s'applique aux concentrations économiques, qui doivent être notifiées lorsqu'elles dépassent un certain seuil en terme d'actifs ou de ventes. En 2000, le Comité a examiné 697 demandes d'autorisation de concentration économique. Dans 436 cas, il a donné son consentement, et il a refusé dans trois cas. Beaucoup d'acheteurs potentiels ont présenté leurs demandes à l'avance. En 2000, près de 60 % des demandes considérées avaient été soumises par des entités économiques étrangères.

- *Interbrew RGN Holding, B.V.* (Pays-Bas) a demandé le consentement du Comité antimonopole de l'Ukraine sur deux transactions, 1) l'achat d'une majorité de contrôle dans *Pyvzavod « Rogan »* et 2) l'achat d'une majorité de contrôle dans *Oleksandriisky Pyvzavod. « Rogan »* et *Oleksandriisky* fournissent les marchés nationaux de la bière et des boissons rafraîchissantes non alcoolisées. La part de marché était inférieure à 35 %. *Interbrew* contrôlait toutefois d'autres brasseries ukrainiennes dont la part cumulée sur le marché de la bière en Ukraine dépassait 20 %. Une enquête plus détaillée a été demandée et des informations ont été rassemblées auprès des organismes de l'État, d'entités économiques des consommateurs, etc. L'enquête détaillée a confirmé que la transaction aboutirait à une position de monopole (c'est-à-dire une part du marché pertinent de plus de 35 %) sur le marché national de la bière et que le marché serait fortement concentré. Les officiels ont recommandé au Comité de refuser son consentement. *Interbrew* a proposé de vendre une autre brasserie qu'il contrôlait. Parallèlement, *Interbrew* a accepté de faire des investissement dans le secteur du malt et de l'orge en Ukraine. Le Comité a consenti aux achats proposés et a contraint juridiquement *Interbrew* à tenir ses engagements concernant la cession de l'autre brasserie.

- *Chodoslovenske Energeticke Zavody* (CEZ) (cité de Kosice, Slovaquie) a demandé au Comité antimonopole de l'Ukraine d'autoriser son acquisition de trois sociétés d'électricité régionales en Ukraine, *Kirovogradoblenergo, Sevastopolenergo* et *Khersonoblenergo*. CEZ avait auparavant fait l'acquisition de *Zhytomyroblenergo*. Les sociétés d'électricité régionale exercent leurs activités sur deux marchés. Premièrement ils fournissent les marchés de l'énergie électrique locaux en utilisant des réseaux locaux d'énergie et occupent une position de monopole sur ces marchés en tant que sujets de monopole naturel. Deuxièmement, ils fournissent le marché national de l'énergie électrique soumise à un tarif réglementé, et leur part de marché est tellement insignifiante qu'ils n'occupent pas une position de monopole soit conjointement soit individuellement. Le Comité a été informé que l'Ukrainian Energetic Partnership (Wilmington, Delaware, USA) accordait une aide financière à CEZ pour cette acquisition et a conclu que les conditions de cette aide n'entraînaient pas un transfert de contrôle de la part de CEZ. Le comité a donné son autorisation.

Venezuela

16. Le Venezuela n'a pas fait de contribution concernant le contrôle des fusions. Conformément à l'article 11 de sa loi sur la concurrence, « les concentrations économiques sont interdites, surtout si elles découlent de l'exercice d'une seule activité, et qu'en conséquence de cette activité, la libre concurrence est restreinte ou une position dominante émerge sur le marché ou sur toute part de ce marché. »

Zambie

17. La Zambie a fourni des statistiques sur le contrôle des fusions et décrit deux cas de fusion impliquant des entreprises nationales et étrangères et ayant un impact transnational. En 2000, le Conseil de la concurrence a pris 48 décisions relatives à des fusions ou à des prises de contrôle, et la Commission de la concurrence de Zambie a clos 22 procédures de fusions/prises de contrôle représentant 47 % de l'ensemble des procédures closes. Dans les deux cas, le fournisseur dominant en Zambie (il s'agissait respectivement de ciment et de sucre) était acquis par un fournisseur potentiel ayant des usines dans les pays voisins.

- 50 % de Chilanga Cement Plc a été vendu à Lafarge SA de France par Pan African Cement (PAC), une filiale de la Commonwealth Development Corporation. Les sociétés de cimenterie en Tanzanie et Malawi faisaient partie de la même transaction. Chilanga Cement fournit plus de 50 % du ciment utilisé en Zambie. Lafarge détient déjà des usines de cimenterie au Zimbabwe et en Afrique du Sud, mais ne fournissait pas la Zambie à partir de ces pays. Il a donc été établi que les parties n'étaient en concurrence directe en Zambie. Toutefois, les usines Lafarge au Zimbabwe ont été considérées comme une source potentielle de concurrence pour fournir la Zambie. En outre, les autorités se sont préoccupées de la possibilité que Lafarge ferme l'usine de Zambie, ce qui aurait posé des problèmes graves d'intérêt public et des effets préjudiciables sur les employés, les entreprises locales ancillaires et les échanges nationaux. Avant cette transaction, La Commission de la concurrence avait des rapports suggérant que Chilanga cement avait abusé de sa position dominante en fixant des prix excessifs et en partageant son marché avec le groupe PAC. Le but recherché par le partage des parts de marché était d'empêcher la vente de ciment zambien au Burundi, qui était auparavant son marché principal. Le Burundi, la Zambie et le Malawi sont membres de la zone de libre-échange COMESA, mais la Tanzanie ne l'est pas. Dans son rapport, la Zambie a noté que le Malawi et la Tanzanie n'avaient pas de loi sur la concurrence, et a déclaré que « en l'absence d'un cadre régional en matière de concurrence, tout effort visant à réglementer le comportement des entreprises transnationales au niveau régional est vain ».

- Illova a notifié à la Commission de la concurrence son projet d'acquisition de plus de 50 % de Zambia Sugar (ZS) auprès de T&L. ZS produit 96 % du sucre produit en Zambie. Illovo est le producteur principal de sucre en Afrique, avec des intérêts au Malawi, à l'île Maurice, au Mozambique, en Afrique du Sud, au Swaziland et en Tanzanie. La transaction a fait passer la part de marché de la fourniture régionale du sucre de 35 % à 39 %. La transaction pourrait évincer un concurrent potentiellement solide et efficace du marché régional, mais la prise de contrôle n'a pas été jugée susceptible d'entraîner la restriction, la prévention, la distorsion de la concurrence sur le marché pertinent (Zambie). Le conseil de la concurrence a autorisé la transaction.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Pursuant to Article 1 of the Convention signed in Paris on 14th December 1960, and which came into force on 30th September 1961, the Organisation for Economic Co-operation and Development (OECD) shall promote policies designed:

- to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and
- to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.

The original Member countries of the OECD are Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The following countries became Members subsequently through accession at the dates indicated hereafter: Japan (28th April 1964), Finland (28th January 1969), Australia (7th June 1971), New Zealand (29th May 1973), Mexico (18th May 1994), the Czech Republic (21st December 1995), Hungary (7th May 1996), Poland (22nd November 1996), Korea (12th December 1996) and the Slovak Republic (14th December 2000). The Commission of the European Communities takes part in the work of the OECD (Article 13 of the OECD Convention).

OECD CENTRE FOR CO-OPERATION WITH NON-MEMBERS

The OECD Centre for Co-operation with Non-Members (CCNM) promotes and co-ordinates OECD's policy dialogue and co-operation with economies outside the OECD area. The OECD currently maintains policy co-operation with approximately 70 non-Member economies.

The essence of CCNM co-operative programmes with non-Members is to make the rich and varied assets of the OECD available beyond its current Membership to interested non-Members. For example, the OECD's unique co-operative working methods that have been developed over many years; a stock of best practices across all areas of public policy experiences among Members; on-going policy dialogue among senior representatives from capitals, reinforced by reciprocal peer pressure; and the capacity to address interdisciplinary issues. All of this is supported by a rich historical database and strong analytical capacity within the Secretariat. Likewise, Member countries benefit from the exchange of experience with experts and officials from non-Member economies.

The CCNM's programmes cover the major policy areas of OECD expertise that are of mutual interest to non-Members. These include: economic monitoring, structural adjustment through sectoral policies, trade policy, international investment, financial sector reform, international taxation, environment, agriculture, labour market, education and social policy, as well as innovation and technological policy development.

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

En vertu de l'article 1er de la Convention signée le 14 décembre 1960, à Paris, et entrée en vigueur le 30 septembre 1961, l'Organisation de Coopération et de Développement Économiques (OCDE) a pour objectif de promouvoir des politiques visant :

- à réaliser la plus forte expansion de l'économie et de l'emploi et une progression du niveau de vie dans les pays Membres, tout en maintenant la stabilité financière, et à contribuer ainsi au développement de l'économie mondiale ;
- à contribuer à une saine expansion économique dans les pays Membres, ainsi que les pays non membres, en voie de développement économique ;
- à contribuer à l'expansion du commerce mondial sur une base multilatérale et non discriminatoire conformément aux obligations internationales.

Les pays Membres originaires de l'OCDE sont : l'Allemagne, l'Autriche, la Belgique, le Canada, le Danemark, l'Espagne, les États-Unis, la France, la Grèce, l'Irlande, l'Islande, l'Italie, le Luxembourg, la Norvège, les Pays-Bas, le Portugal, le Royaume-Uni, la Suède, la Suisse et la Turquie. Les pays suivants sont ultérieurement devenus Membres par adhésion aux dates indiquées ci-après : le Japon (28 avril 1964), la Finlande (28 janvier 1969), l'Australie (7 juin 1971), la Nouvelle-Zélande (29 mai 1973), le Mexique (18 mai 1994), la République tchèque (21 décembre 1995), la Hongrie (7 mai 1996), la Pologne (22 novembre 1996), la Corée (12 décembre 1996) et la République slovaque (14 décembre 2000). La Commission des Communautés européennes participe aux travaux de l'OCDE (article 13 de la Convention de l'OCDE).

CENTRE DE L'OCDE POUR LA COOPÉRATION AVEC LES NON-MEMBRES

Le Centre de l'OCDE pour la coopération avec les non-membres (CCNM) a pour mission de promouvoir et de coordonner la coopération et le dialogue sur les politiques à suivre entre l'OCDE et les économies extérieures à la zone de l'OCDE. L'Organisation entretient actuellement des liens de coopération avec quelque 70 économies non membres.

A travers ses programmes de coopération avec les non-membres le but essentiel du CCNM est de mettre les ressources, riches et variées, que l'OCDE a développées pour ses propres Membres, à la disposition des économies non membres intéressées. Au nombre de ces ressources, on peut citer, par exemple, ses méthodes de coopération sans équivalent qui sont le fruit d'une longue expérience ; l'inventaire des pratiques optimales dans la plupart des domaines de l'action publique qui a été dressé à partir de l'expérience des pays Membres ; le dialogue permanent entre hauts responsables venus des capitales, renforcé par le processus des examens mutuels ; la capacité de l'OCDE de traiter les questions pluridisciplinaires. Toutes ces activités s'appuient sur une vaste base de données rétrospectives et sur les solides capacités d'analyse du Secrétariat. De la même manière, les pays Membres eux-mêmes bénéficient des échanges d'expériences avec des experts et de hauts responsables des économies non membres.

Les programmes du CCNM couvrent les principaux domaines d'action des gouvernements dans lesquels l'OCDE dispose de compétences et qui présentent un intérêt mutuel pour les Membres et les non-membres. Parmi ces domaines figurent le suivi de l'évolution économique, l'ajustement structurel par le biais de politiques sectorielles, la politique commerciale, l'investissement international, la réforme du secteur financier, la fiscalité internationale, l'environnement, l'agriculture, le marché du travail, l'éducation et la politique sociale, ainsi que l'innovation et le développement technologique.